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IN THE SUPREME COURT OF THE UNITED STATES
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JOSEPH R. BIDEN, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Petitioners,)
v.) No. 22-506
NEBRASKA, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.
Tuesday, February 28, 2023

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:12 a.m.

APPEARANCES:
GEN. ELIZABETH B. PRELOGAR, Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioners.
JAMES A. CAMPBELL, Solicitor General, Lincoln,
Nebraska; on behalf of the Respondents.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-506, Biden versus Nebraska.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

COVID-19 is the most devastating pandemic in our nation's history and it has caused enormous disruption and economic distress. Over the past three years, millions of Americans have struggled to pay rent, utilities, food, and many have been unable to pay their debts.

To head off immediate harm for student-loan borrowers, two Secretaries across two administrations invoked the HEROES Act to suspend interest and payment obligations for all Americans with federally held loans. But, if that forbearance ends without further relief, it's undisputed that defaults and delinquencies will surge above pre-pandemic levels.

1 So Secretary Cardona again invoked the
2 HEROES Act to provide a measure of loan
3 forgiveness to ensure that this unprecedented
4 pandemic does not leave borrowers worse off in
5 relation to their student loans.

6 The states ask this Court to deny that
7 vital relief to millions of Americans, but they
8 lack standing to seek that result. They
9 principally assert harm to a separate legal
10 person, MOHELA, that could sue in its own name
11 but has chosen not to do so, and the states'
12 asserted harms to their tax revenues are
13 self-inflicted and indirect. The states' bare
14 disagreement with this policy is not the sort of
15 concrete injury that Article III demands.

16 On the merits, the states say the Act
17 doesn't authorize the Secretary to ever forgive
18 loan principal. But the Secretary's
19 interpretation of this text is not just a
20 plausible reading; it's the best reading.
21 Congress expressly authorized the Secretary to
22 waive or modify any Title IV provision in
23 emergencies to provide financial relief to
24 borrowers. Loan forgiveness is a paradigmatic
25 form of debt relief, and the Secretary acted

1 within the heartland of his authority and in
2 line with the central purpose of the HEROES Act
3 in providing that relief here.

4 To apply the major questions doctrine
5 to override that clear text would deny borrowers
6 critical relief that Congress authorized and the
7 Secretary deemed essential.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: General, is this a
10 waiver, or is it a modification?

11 GENERAL PRELOGAR: It's both a waiver
12 and a modification, Justice Thomas. This
13 appears at JA 261. That was the decision
14 document that the Secretary signed where he
15 said, I hereby issue waivers and modifications
16 of multiple provisions under Title IV of the
17 student loan program. And then that language
18 was repeated in the Federal Register notice that
19 actually implemented that program and
20 constitutes the final agency action that the
21 states are challenging here.

22 JUSTICE THOMAS: Well, could you
23 explain then -- in -- in -- in other provisions,
24 there is express language as to cancellation,
25 and, of course, there isn't here.

1 So would you take a minute to explain
2 how a waiver or modification amounts to a waiver
3 -- to a cancellation?

4 GENERAL PRELOGAR: Of course. So the
5 Secretary identified various provisions in Title
6 IV that govern the terms and conditions of
7 student loans and also govern discharge and
8 cancellation in other circumstances, as your
9 question suggested.

10 And I think the straightforward way to
11 think about how the verbs map onto the
12 Secretary's action is that he waived elements of
13 those provisions that contain eligibility
14 requirements for discharge and cancellation that
15 are inapplicable under this program and then
16 modified the provisions to contain the
17 limitations that he had announced as part and
18 parcel of announcing this loan forgiveness.

19 Now you had suggested that there's no
20 express statement in the HEROES Act to discharge
21 loan principal, and that's true, but the
22 relevant and operative language here is the
23 provision that says the Secretary is empowered
24 to waive or modify any Title IV provision, and
25 so the HEROES Act isn't enumerating any of the

1 various forms of relief that have long been
2 authorized and implemented under this statute.

3 I don't think anything can be read
4 into the fact that there's no express reference
5 to particular forms of relief because Congress
6 was trying to broadly cover the field and ensure
7 that the Secretary had the tools to respond to
8 the national emergency with whatever relief
9 might be necessitated.

10 CHIEF JUSTICE ROBERTS: But, in an
11 opinion we had a few years ago by Justice
12 Scalia, he talked about what the word "modify"
13 means, and he said modified in our view connotes
14 moderate change. He said it might be good
15 English to say that the French Revolution
16 modified the status of the French nobility, but
17 only because there's a figure of speech called
18 understatement and a literary device known as
19 sarcasm.

20 We're talking about half a trillion
21 dollars and 43 million Americans. How does that
22 fit under the normal understanding of
23 "modifying"?

24 GENERAL PRELOGAR: So, of course, I
25 recognize that in MCI, Justice Scalia's opinion

1 adopted a narrower understanding of that term,
2 but I don't read that opinion to set forth a
3 universal meaning of "modify," no matter the
4 statutory context.

5 And, here, of course, we have a
6 broader phrase, "waive or modify." It's
7 undisputed and the states aren't contesting that
8 the ordinary meaning of "waive" means to
9 eliminate an obligation in its entirety. And I
10 think, if you look at that phrase in the context
11 of the statute, that means that "modify" has to
12 mean making a change up to the point of
13 wholesale elimination.

14 It would be really strange for
15 Congress to say you can eliminate obligations
16 altogether or tweak them just the littlest bit,
17 but you can't do anything in between.

18 CHIEF JUSTICE ROBERTS: Well, but it's
19 "waive" particular regulatory or statutory
20 provisions.

21 GENERAL PRELOGAR: That's right.

22 CHIEF JUSTICE ROBERTS: That to me
23 suggests a much more focused use of the word.

24 GENERAL PRELOGAR: Well, it's "waive
25 or modify" paired with the authority to do that

1 with respect to any Title IV provision. So I
2 think that that is the --

3 CHIEF JUSTICE ROBERTS: It doesn't say
4 waive -- modify or waive loan balances.

5 GENERAL PRELOGAR: That's true, but
6 it's very clear that under the Title IV
7 provisions that are expressly referenced in the
8 statute, things like repayment obligations,
9 cancellation, discharge, are core features of
10 the program and obvious candidates for waiver in
11 a statute, the central purpose of which is to
12 provide debt relief to borrowers.

13 You know, Congress itself has provided
14 for loan discharge in other circumstances in
15 response to borrower hardship. It's included
16 provisions in the Higher Education Act for
17 bankruptcy, for example, or for total disability
18 or school closure, other kinds of hardships.

19 And so it couldn't have surprised
20 Congress one bit that in response to hardship
21 posed by a national emergency, the Secretary
22 might consider similarly providing discharge if
23 that's what it takes to make sure borrowers
24 don't default.

25 CHIEF JUSTICE ROBERTS: You think

1 because there's a provision to allow waiver when
2 your school closes, that because of that,
3 Congress shouldn't have been surprised when half
4 a trillion dollars is wiped off the books?

5 GENERAL PRELOGAR: Well, I think it
6 demonstrates that in a statute that's centrally
7 focused on providing financial relief, that that
8 terminology should be given its plain meaning,
9 and Congress could have anticipated that in a
10 particular situation, you might expect that the
11 way that you need to ameliorate the borrower
12 harm is through loan forgiveness.

13 And, Mr. Chief Justice, maybe I can
14 just use an example drawn from the initial
15 context of promulgation of this statutory
16 relief. It was initially a bill that was
17 limited just to helping service members who were
18 fighting in wars. And think about an example of
19 a service member who goes off to war and you can
20 provide HEROES Act relief to ensure that the
21 service member doesn't have to pay down the loan
22 while the term of service, but if something were
23 to happen that left that service member worse
24 off because of his service, say a disability
25 that doesn't qualify for total discharge, it

1 makes perfect sense to think that Congress would
2 have expected that the Secretary would have
3 authority under this Act to make the service
4 member whole and to ensure, just as the plain
5 language suggests, that that service member
6 isn't going to be left worse off because of the
7 circumstance that prompted his service in the
8 first place.

9 And so there's that first-order
10 question of whether you can ever do any debt
11 discharge. And I think, in that context, it's
12 perfectly sensible to read this language to
13 authorize that.

14 JUSTICE SOTOMAYOR: General, the
15 amount at issue, the Chief mentioned the quarter
16 trillion dollars or the half a trillion dollars.
17 How do you deal with that? Because that seems
18 to favor the argument that this is a major
19 question.

20 GENERAL PRELOGAR: Yes, Justice
21 Sotomayor. So, of course, we acknowledge that
22 this is an economically significant action, but
23 I think that that can't possibly be the sole
24 measure for triggering application of the major
25 questions doctrine.

1 In prior cases, the Court has pointed
2 to economic and political significance, but it's
3 also reviewed a litany of additional factors
4 that have demonstrated that based on
5 common-sense understandings of how Congress is
6 likely to legislate, the agency is claiming
7 extravagant regulatory authority that it doesn't
8 actually have.

9 And I think, if the Court were to just
10 look at costs alone, it would take the major
11 questions doctrine outside of that extraordinary
12 case because national policies these days
13 frequently do involve more substantial costs or
14 trigger political controversy.

15 Here, we think that there are any
16 number of additional factors that demonstrate
17 that this does not fit the major questions
18 paradigm. And the first thing I would point to
19 is that this is not an assertion of regulatory
20 authority at all.

21 This is the administration of a
22 benefits program. And the Court in prior cases
23 had -- has recognized that you -- using
24 common-sense interpretations of understanding
25 how Congress would legislate, Congress might

1 pause before empowering the executive to engage
2 in extravagant regulation with the corresponding
3 cost to individual liberty interests.

4 But, in the context of a benefits
5 program, there's not that same reason to
6 hesitate about what Congress might have intended
7 because it's perfectly logical for Congress to
8 broadly empower the executive to provide
9 benefits, especially in a crisis situation or an
10 emergency like we've seen with COVID-19.

11 JUSTICE ALITO: General, let's say
12 that nobody in Congress was aware that there is
13 such a thing in our case law called the major
14 questions doctrine. So put that out of their
15 minds.

16 And you simply polled every member of
17 Congress and asked that person whether, in the
18 ordinary sense of the term, they would regard
19 what the government proposes to do with student
20 loans as a major question or something other
21 than a major question.

22 GENERAL PRELOGAR: Well, I certainly
23 acknowledge that in a colloquial sense you could
24 characterize this as a major policy. We're not
25 disputing that point.

1 But, again, I think that that applies
2 to any number of actions that the government
3 might take, and especially in the context of
4 benefits programs, where just based on the size
5 of those programs and the number of individuals
6 affected, the costs can frequently run into the
7 billions of dollars.

8 So I don't --

9 JUSTICE ALITO: Is there any
10 conceptual reason why the major questions
11 doctrine should apply to most regulatory matters
12 but not to the -- not to benefits programs?

13 GENERAL PRELOGAR: The reason we think
14 it shouldn't apply in the same way to benefits
15 programs is because it doesn't involve that
16 corresponding tradeoff on individual liberty
17 interests.

18 The Court in some of the prior cases
19 in this area has expressed concern that if the
20 government is claiming an extraordinary power to
21 regulate, that means it can encroach on the
22 lives of individuals, the affairs of businesses,
23 and quite directly impose onerous burdens on
24 them.

25 JUSTICE ALITO: It may have an effect

1 on important individual rights, but do you think
2 that the doctrine also or perhaps primarily has
3 a separation of powers component?

4 GENERAL PRELOGAR: Yes, of course, I
5 recognize the Court has grounded it in the
6 separation of powers, but I think that that cuts
7 in favor of the distinction that we're trying to
8 make because, if the Court were to apply major
9 questions in this benefits context, even in a
10 circumstance where you might think Congress
11 could quite reasonably want to legislate
12 broadly, then it would have the effect of
13 potentially overriding Congress's intent,
14 contrary to the same kind of separation of
15 powers principles the Court has focused on in
16 prior cases.

17 JUSTICE ALITO: Well, I don't
18 understand why it would under -- undermine
19 Congress's intent to a greater extent in that
20 context. But drawing a distinction between
21 benefits programs and other programs seems to
22 presume that when it comes to the administration
23 of benefits programs, a trillion dollars here, a
24 trillion dollars there, it doesn't really make
25 that much difference to Congress. That doesn't

1 seem very sensible.

2 GENERAL PRELOGAR: Of course, I
3 acknowledge that there can be substantial costs
4 associated with benefits programs, but I guess
5 the reason I'm pressing on this distinction is
6 because I'm trying to think through, you know,
7 what is Congress supposed to do when it wants to
8 empower the executive to --

9 JUSTICE ALITO: But, I mean, isn't the
10 question, looking at this program and looking at
11 this question, is this the sort of thing that
12 Congress is likely to address expressly or
13 through a contestable interpretation of some
14 statutory language?

15 GENERAL PRELOGAR: Well, of course, we
16 think Congress did address this expressly here,
17 and Congress directed that in the context of a
18 national emergency, that is the -- the
19 limitation of the HEROES Act, so the Secretary
20 can't invoke this whenever he wants. There has
21 to be that predicate war or military operation
22 or national emergency.

23 In that context, in line with
24 Congress's limitations on who can count as an
25 affected individual by that emergency, in line

1 with the purposes that relief has to serve,
2 Congress said you can waive or modify any Title
3 IV provision in order to get relief to
4 borrowers.

5 And, Justice Alito, I would point to
6 the forbearance policy that's been in place for
7 the prior three years, put into place right at
8 the beginning of the pandemic by then Secretary
9 DeVos. That has been an economically
10 significant program. It's currently costing the
11 federal government more per year than this loan
12 forgiveness plan would cost the government
13 annually.

14 But I would argue that that is right
15 in the heartland of what the HEROES Act aimed to
16 do. It was critical relief that was rushed out
17 at the beginning of this devastating pandemic to
18 ensure that we didn't see spikes in delinquency
19 and default across the nation.

20 JUSTICE ALITO: May I ask you a
21 question about standing? So it's the case,
22 isn't it, that if any party in either of these
23 two cases has standing, then it would be
24 permissible for us to reach the merits of the
25 issue?

1 GENERAL PRELOGAR: Yes. In -- in the
2 states' case, if you conclude that any party has
3 standing, then the Court could go on to the
4 merits. In the case that the Court is going to
5 hear next, we think that there are objections to
6 the procedural claim with respect to the
7 borrowers' objections there.

8 JUSTICE ALITO: Okay. Then let me ask
9 you a question about MOHELA or maybe a question
10 or two. If MOHELA itself had brought this suit,
11 would you contest Article III standing?

12 GENERAL PRELOGAR: No, we would not.
13 So we think that if MOHELA made allegations that
14 the plan was going to have financial effects on
15 it, it could sue in its own name and we would
16 not contest Article III standing.

17 JUSTICE ALITO: All right. So then we
18 would consider the Article III standing of the
19 State of Missouri, right?

20 GENERAL PRELOGAR: That's right.

21 JUSTICE ALITO: And the -- the -- the
22 most -- the part of the Article III test that's
23 most disputed is injury in fact, is that
24 correct?

25 GENERAL PRELOGAR: That's right.

1 We're also contesting causation --

2 JUSTICE ALITO: Right.

3 GENERAL PRELOGAR: -- and
4 redressability here, but I think injury in fact
5 is one of the critical points in dispute with
6 respect to MOHELA and the state's attempt to
7 assert MOHELA's injury.

8 JUSTICE ALITO: Okay. Injury in fact
9 is a factual question. So I understand a big
10 thrust of your argument to be that Missouri
11 lacks standing because MOHELA is -- is
12 separately incorporated. But why should that
13 formal distinction govern the determination of
14 injury in fact?

15 GENERAL PRELOGAR: So we think that
16 the injury in fact analysis here has both a
17 factual and a legal component.

18 In the first place, of course, we're
19 making arguments that even if there's a
20 financial injury to MOHELA, the state hasn't
21 carried its -- its burden to show that that will
22 have downstream effects on the state or that
23 those would be cognizable. MOHELA hasn't paid
24 money into the relevant state fund for the past
25 15 years. It said that further payments were

1 not deemed probable even before this plan was
2 announced.

3 But even putting the -- the factual
4 discrepancies to the side, there's a fundamental
5 problem as a matter of law with the claim of
6 injury, and I think it arises directly from two
7 sets of blackletter law principles.

8 The first is that the whole point of
9 incorporation is that you're creating a separate
10 legal person with its own rights and interests.
11 And Missouri has derived substantial benefits
12 from structuring MOHELA that way.

13 And the second is the basic Article
14 III principle that a party has to come to court
15 and assert her own rights and interests.

16 JUSTICE ALITO: Right.

17 GENERAL PRELOGAR: She can't invoke
18 the interests of a third party.

19 JUSTICE ALITO: All of that is
20 certainly true. You think that our -- that
21 the lack -- the fact that MOHELA is incorporated
22 is the end of the day? That's enough to -- to
23 defeat standing?

24 GENERAL PRELOGAR: We think, as a
25 matter of first principles, yes, that this Court

1 has several times emphasized that when you have
2 a separately incorporated instrumentality like
3 that, the corporate separateness should be
4 respected and that that --

5 JUSTICE ALITO: Well, what about --

6 GENERAL PRELOGAR: -- serves
7 important --

8 JUSTICE ALITO: -- Lebron and Amtrak?

9 GENERAL PRELOGAR: So those are
10 doctrines not focused on Article III standing,
11 of course, but instead are testing for other
12 things.

13 In Lebron, that was a state action
14 case, and the Court's reasoning was that you
15 shouldn't be able to parcel out governmental
16 functions to an instrumentality and thereby
17 evade the strictures of the Constitution.

18 JUSTICE ALITO: Well, have we ever
19 decided a case that presents what you see is the
20 issue here or what the parties see as the issue,
21 as one of the issues, which is whether, for
22 Article III standing purposes, a -- an entity is
23 part of a state?

24 GENERAL PRELOGAR: No. So the Court
25 hasn't addressed this issue in the context of

1 Article III. There aren't cases that are
2 directly on point on either side, but I think
3 that we definitely have the better argument of
4 the first principles here based on the
5 propositions I mentioned earlier, including
6 those that generally make clear that the Court
7 won't countenance third-party claims seeking to
8 invoke rights and interests of individuals or
9 entities that aren't before the Court.

10 And I think it would be particularly
11 anomalous to recognize some kind of exception to
12 those principles here for two reasons.

13 JUSTICE ALITO: No, but the question
14 would be whether MOHELA is part of the State of
15 Missouri for present purposes. And where we're
16 considering injury in fact, why should the test
17 turn solely or why should the lack of corporate
18 status be a necessary element? Why shouldn't
19 the test be something more like whether the
20 relationship between this entity and the State
21 of Missouri is such that an injury to MOHELA
22 will necessarily or presumptively be an injury
23 to the state?

24 And if that's the case, doesn't that
25 all point to the reasons for setting up MOHELA

1 as a very relevant factor and the degree of
2 state control, the degree of the governor's
3 control over MOHELA as a very important factor?

4 GENERAL PRELOGAR: I don't think that
5 those factors should count as important in the
6 analysis, and to the extent the Court is
7 inclined to broaden out the analysis beyond the
8 principles I've articulated about corporate
9 separateness, I think the most critical fact
10 would be whether there's financial entanglement
11 and whether Missouri has itself decided to blur
12 those lines for purposes of making it
13 responsible for MOHELA's own liabilities.

14 JUSTICE JACKSON: And, in fact, isn't
15 that really, as you say, the most important
16 thing if economic injury is the point?

17 GENERAL PRELOGAR: Yes.

18 JUSTICE JACKSON: I mean, I had
19 understood that the injury that was being
20 asserted here was an economic injury, but if we
21 look at MOHELA and we see that its financial
22 interests are totally disentangled from the
23 state, it stands alone, it's incorporated
24 separately, the state is not liable for anything
25 that happens to MOHELA, I don't know how that

1 could possibly be a reason to say that an injury
2 to MOHELA should count as an injury to the
3 state.

4 GENERAL PRELOGAR: Yes, we agree
5 exactly with that analysis. And it's important
6 to think about the benefits that Missouri has
7 obtained from structuring MOHELA that way.

8 This is not the first lawsuit that
9 MOHELA's been involved in. Actually, MOHELA is
10 not involved in this particular suit, but in
11 prior suits, when MOHELA's been sued, the
12 state's been entirely absent because state law
13 makes clear that Missouri cannot be on the hook
14 for MOHELA's liabilities. It creates a wall of
15 separation financially between the two entities,
16 and Missouri gets a lot of benefit from that.

17 JUSTICE JACKSON: And so --

18 JUSTICE SOTOMAYOR: General --

19 JUSTICE JACKSON: -- if MOHELA is
20 being injured as a result of the plan or at
21 least if that's the allegation, MOHELA has the
22 ability to defend itself and its interests,
23 correct?

24 GENERAL PRELOGAR: Exactly. It's a
25 separate legal person. It has the right to sue

1 or be sued in its own name. There is nothing
2 that stands in the way of MOHELA asserting these
3 interests if it's experiencing financial harm,
4 and there's no --

5 JUSTICE JACKSON: But wouldn't --

6 GENERAL PRELOGAR: -- principle that
7 would support allowing Missouri now to interfere
8 with the separation it itself has created --

9 JUSTICE JACKSON: And so would we be
10 breaking --

11 GENERAL PRELOGAR: -- just because it
12 doesn't like the policy.

13 JUSTICE JACKSON: -- would we be
14 breaking new ground then if, on this basis, we
15 found standing?

16 GENERAL PRELOGAR: Yes. I'm not aware
17 of any case that would support standing on this
18 basis.

19 JUSTICE ALITO: Well, would we be
20 breaking new ground if we found that there was
21 standing since we've never been presented, as
22 you admitted earlier, with a case that presents
23 precisely the issue that's here?

24 GENERAL PRELOGAR: It's true that it's
25 a new fact pattern, but I think that the Court

1 would be breaking new ground with respect to the
2 general principles that it's asserted in
3 third-party standing contexts. There, for
4 example, one of the critical facts the Court has
5 highlighted is whether there's some impediment
6 that would prevent the party whose rights and
7 interests are implicated from pursuing its own
8 claim. There is nothing like that here, and the
9 Court has never recognized a doctrine of
10 third-party standing on facts like these.

11 JUSTICE KAGAN: Do you have any
12 understanding about why MOHELA isn't here?

13 GENERAL PRELOGAR: No. The only
14 evidence in the record about MOHELA is that its
15 involvement in this suit has been responding to
16 sunshine law requests. I think it's possible
17 that loan servicers have --

18 JUSTICE KAGAN: Sunshine law requests
19 brought by?

20 GENERAL PRELOGAR: Brought by the
21 state. So Missouri served sunshine law requests
22 on MOHELA to get information about its financial
23 interests.

24 JUSTICE KAGAN: Because MOHELA was not
25 giving over information voluntarily?

1 GENERAL PRELOGAR: That's correct. I
2 think it just reinforces the sense that there
3 was separation here between the state and this
4 instrumentality. If I had to speculate, I think
5 that loan servicers, during the course of the
6 forbearance policy, have seen some of their
7 servicing fees be reduced in light of that
8 policy, and it's possible that they are waiting
9 for forbearance to lift so that they can start
10 collecting those fees again, and that might be a
11 possible reason why they made the judgment that
12 they don't want to stand in the way of this
13 forgiveness policy, because it's a critical
14 component of allowing payments to resume.

15 JUSTICE ALITO: Do you think there
16 might be a dependent relationship between
17 agencies like MOHELA and the federal government
18 since we're speculating about why they're not
19 here?

20 GENERAL PRELOGAR: Certainly, there
21 are contractual relationships, yes.

22 JUSTICE SOTOMAYOR: General --

23 JUSTICE JACKSON: Can I ask you, you
24 -- oh, I'm sorry.

25 JUSTICE SOTOMAYOR: General, there was

1 a Missouri case in 1979, Menorah Medical Center,
2 with an agency much like MOHELA, and, there, the
3 Missouri Supreme Court said that that entity was
4 not the state. States are free to organize
5 themselves and structure themselves in any way
6 they want, correct?

7 GENERAL PRELOGAR: Correct, yes.

8 JUSTICE SOTOMAYOR: And it would be
9 odd for us to have a state say we're creating a
10 corporation, we're not going to be responsible
11 for its debts, we're not going to be responsible
12 for any of its contracts, we're not going to be
13 responsible for anything it does financially,
14 and the state itself says this is not the state,
15 it's an independent corporation, and we're going
16 to say instead that it is the state, correct?

17 GENERAL PRELOGAR: Yes. I think that
18 it would be really anomalous to override the
19 separation that Missouri itself created between
20 it and MOHELA in the context of this case, this
21 case --

22 JUSTICE SOTOMAYOR: Or to override its
23 own state supreme court's decision that it is
24 not the state?

25 GENERAL PRELOGAR: Yes, that's

1 correct.

2 JUSTICE BARRETT: General, I'm
3 thinking of, in Arkansas versus Texas, it was
4 significant in that case that Arkansas owned the
5 land of the university. So it does seem that
6 Missouri has created this separateness with
7 respect to the liabilities of MOHELA.

8 What if -- and I'll ask this to the
9 other side. It's not really clear to me what
10 happens to MOHELA's assets. I mean, what if
11 MOHELA itself dissolves? There are no
12 shareholders. I mean, does your answer change
13 if, even though Missouri is not responsible for
14 the liabilities, it does have an ownership stake
15 in the assets of MOHELA?

16 GENERAL PRELOGAR: I think it's clear
17 under state law, Justice Barrett, that Missouri
18 doesn't have that kind of ownership interest in
19 the assets of MOHELA. And I would point in
20 particular to Missouri Revised Statute 173.410.
21 This is the provision that makes clear that
22 Missouri cannot take the assets of MOHELA and
23 appropriate them. They don't go into the
24 general treasury. It makes clear instead that
25 those assets are under MOHELA's exclusive

1 control.

2 So I think, as a matter of state law
3 here, we don't have anything like the Arkansas
4 case that you just referenced. And as well, the
5 flip side of that is the provision of state law
6 that likewise says Missouri is not going to be
7 liable for any agreements or obligations or
8 liability of MOHELA so that if MOHELA goes out
9 there in the world and harms someone, the
10 state's not on the hook for the damage.

11 And that's another distinction from
12 the Arkansas case, where, under state law there,
13 it was clear that a suit against the
14 instrumentality was a suit against the state
15 itself.

16 JUSTICE BARRETT: Would you have the
17 same position with respect to federal
18 corporations? Like what about the FDIC or, you
19 know, organizations like that, what if the
20 agency didn't want to sue? Could the United
21 States sue to protect the federal government's
22 interests if the corporate identity was separate
23 like here?

24 GENERAL PRELOGAR: No. I think that
25 our principles would apply with respect to our

1 own instrumentalities. We could, of course, sue
2 to protect interests -- distinct rights and
3 interests of the United States. And so
4 Respondents have cited some cases, for example,
5 where an instrumentality entered into a contract
6 on behalf of the United States in the name of
7 the United States as its agent, and we had a
8 contract right that we could enforce in our own
9 name, or there was another case that involved a
10 statutory right in the tax context to offset,
11 and the United States was permitted to sue on
12 that basis because it had its own rights and
13 interests.

14 But we've never done what the states
15 are doing here and, in the absence of any
16 underlying contract right or statutory right or
17 trust right, just asserted this all-purpose
18 ability to blur the distinction between the
19 sovereign and instrumentalities when they're
20 separately incorporated in this way.

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you --
23 thank you, General. I just have a question on
24 -- on the major questions doctrine, and I wanted
25 just a little bit of background for why -- I

1 want to get your views on how it applies.

2 You're -- you're arguing here that no
3 notice-and-comment proceeding was required
4 before the action taken on the half trillion
5 dollars of loans and that because of your view
6 that the President can act unilaterally, that
7 there was no role for Congress to play in this
8 either, and at least in this case, given your
9 view of standing, there's no role for us to play
10 in this -- in this either.

11 Now we take very seriously the idea of
12 the separation of powers and that power should
13 be divided to prevent its abuse, and there are
14 many procedural niceties that have to be
15 followed for the same purpose.

16 The case reminds me of the one we had
17 a few years ago under a different administration
18 where the administration tried acting on its own
19 to cancel the Dreamers program, and we blocked
20 that effort.

21 And I just wonder, given the posture
22 of the case and given our historic concern about
23 the separation of powers, you would recognize at
24 least that this is a case that presents
25 extraordinarily serious, important issues about

1 the role of Congress and about the role that we
2 should exercise in scrutinizing that,
3 significant enough that the major questions
4 doctrine ought to be considered implicated?

5 GENERAL PRELOGAR: Well, Mr. Chief
6 Justice, let me try to respond to the concerns
7 about both the role for the judiciary and the
8 role for Congress here.

9 We are not suggesting that there's no
10 role for the judiciary to play. It's that these
11 plaintiffs are not proper plaintiffs in this
12 case. Of course, the Court is bound by Article
13 III, and as I acknowledged to Justice Alito, we
14 think that loan servicers, for example, would
15 have standing to challenge this plan.

16 But the fact that the loan servicers
17 haven't yet challenged to date doesn't provide a
18 basis to overlook those fundamental Article III
19 requirements and distort the meaning of how this
20 Court has previously articulated standing
21 principles in a circumstance where the states
22 can't otherwise demonstrate their standing to
23 sue.

24 With respect to the role for Congress,
25 I think what's clear is, of course, we're

1 recognizing that Congress could take additional
2 action if it disapproves this plan. In fact,
3 there were bills introduced to alter the text of
4 the HEROES Act to specifically provide that the
5 Secretary can't authorize loan discharge. Those
6 bills didn't pass, but that's one role Congress
7 can play.

8 I think, though, that if the Court is
9 focused on trying to ensure that Congress's role
10 in this process is respected, that just argues
11 in favor of reading this text in line with what
12 the plain language suggests. You know, these
13 are not words of limitation in the actual
14 assertion of authority here, waive or modify any
15 Title IV provision.

16 The states want this Court to say
17 Congress really only meant waive or modify some
18 of the provisions, not all of them, not the
19 central provisions that govern repayment and
20 cancellation, when those would have been obvious
21 candidates for waiver or modification in a loan
22 discharge program.

23 And if the Court overrides that clear
24 HEROES Act language here, I think that it could
25 only thwart Congress's intent in this particular

1 posture of ensuring that you have the tools, the
2 Secretary has the tools he needs to take care of
3 Americans in a -- a national emergency
4 situation.

5 CHIEF JUSTICE ROBERTS: But whether
6 Congress acted or not was a factor that we
7 considered in the major questions doctrine, and
8 the way we considered it is whether or not the
9 issue that was before the Court is something
10 that had been seriously considered and debated
11 and was a matter of political controversy before
12 Congress.

13 That certainly is the case here,
14 right?

15 GENERAL PRELOGAR: That's right.
16 We're not disputing that this is a politically
17 significant action. But, if you're focused --

18 CHIEF JUSTICE ROBERTS: Well, not just
19 a politically significant action but one that
20 has the attention of Congress. The fact that it
21 hasn't acted under the major questions doctrine
22 but has considered the matter we cited as
23 support for the notion that maybe it should be
24 one for Congress.

25 If you're talking about this in the

1 abstract, I think most casual observers would
2 say, if you're going to give up that much amount
3 of money, if you're going to affect the
4 obligations of that many Americans on a subject
5 that's of great controversy, they would think
6 that's something for Congress to act on.

7 And if they haven't acted on it, then
8 maybe that's a good lesson to say for the
9 President or -- or the administrative
10 bureaucracy that maybe that's not something they
11 should undertake on their own.

12 GENERAL PRELOGAR: Well, let me react
13 to that in a couple of different ways, Mr. Chief
14 Justice.

15 First is to emphasize that the
16 unenacted legislation that the states are
17 pointing to here did not mirror the particulars
18 of this plan, so I don't think it would be right
19 to say that Congress has specifically focused on
20 this plan and disapproved it.

21 And if the Court were to go down that
22 road, I'd point again to the fact that
23 there's -- there's legislative inaction on the
24 other side of not amending the HEROES Act.

25 But I would think that the Court, as

1 it usually does, would place more focus on
2 enacted legislation. And, here, during the
3 pandemic, Congress enacted a provision of the
4 American Rescue Plan that specifically
5 anticipated and sought to facilitate a program
6 of loan discharge by providing that it wouldn't
7 be subject to federal taxation from 2021 to
8 2025.

9 So I think that that congressional
10 action actually carries more weight in the
11 analysis.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas, anything further?

14 JUSTICE THOMAS: Just briefly.

15 There's some discussion in the briefs
16 that going past with this provision or that
17 modification or waiver, that this is, in effect,
18 a cancellation of a debt -- that's really what
19 we're talking about -- and that as a
20 cancellation of \$400 billion in debt, in effect,
21 this is a grant of \$400 billion, and it runs
22 head long into Congress's appropriations
23 authority, and I'd like to give you some time to
24 respond to that.

25 GENERAL PRELOGAR: Sure. And so,

1 first, I want to take on the argument that some
2 amici have made in this case about implicating
3 appropriations authority.

4 Of course, implementing this program
5 doesn't require that any money be drawn from the
6 Treasury, and so I don't think that it strictly
7 raises an appropriations issue, which is why I
8 think the states aren't raising that argument
9 here.

10 And to the extent that the concern is
11 about the Secretary taking action in a way that
12 Congress didn't authorize, it seems to me that
13 it just collapses back into the central
14 interpretive question in this case, which is
15 does the HEROES Act authorize the Secretary's
16 action or not.

17 With respect to the concern you raised
18 that the -- the effect of loan forgiveness here
19 will result in cancellation of a measure of debt
20 for the affected borrowers, of course, that's
21 true, but I don't think that that is materially
22 different from the kind of effects you can see
23 from other types of authority that's long been
24 exercised under the HEROES Act.

25 You know, take the forbearance policy

1 that I mentioned. This has been powerful relief
2 for debtors -- I'm sorry, for student-loan
3 borrowers while it's been in place with respect
4 to their debt.

5 And it's had, you know, kind of
6 permanent financial effects on the government,
7 over \$150 billion over the course of that
8 forbearance program by the end of it, but it's
9 been absolutely critical relief. And it's
10 provided that kind of help to the student-loan
11 borrowers as well who haven't had to make those
12 interest payments or any payments on their loans
13 while it's been in place.

14 And that too can have the kind of
15 consequence of resulting in cancellation of
16 principal. During the period of forbearance,
17 the -- the years that borrowers spent in
18 forbearance count towards loan forgiveness
19 programs, for example. So, at the end of the
20 day, those borrowers in income-driven repayment
21 or public service loan forgiveness are going to
22 pay less on their loan overall.

23 It will be forgiven three years
24 earlier or without those three years of payments
25 that they weren't obligated to make. But I

1 don't think that in any sense calls into
2 question the legitimacy and authorization behind
3 the forbearance policy.

4 JUSTICE THOMAS: Well, I -- I think
5 that forbearance fits more comfortably in
6 modify -- waive or modify language. It's you
7 simply forbearing on collecting an underlying
8 debt, but you don't cancel the debt. And that's
9 what we're talking about here.

10 And, certainly, there's a cost to
11 that, I understand, but I -- I still think that
12 you haven't fully explained why, if you looked
13 at this, you could not -- you would not argue
14 that the Secretary could actually grant four
15 billion -- \$400 billion.

16 GENERAL PRELOGAR: Well, he --

17 JUSTICE THOMAS: Do we agree on that?

18 GENERAL PRELOGAR: I'm sorry --

19 JUSTICE THOMAS: He could not give
20 grants of --

21 GENERAL PRELOGAR: -- outside the
22 context of the HEROES Act?

23 JUSTICE THOMAS: Yes.

24 GENERAL PRELOGAR: That's right. We,
25 of course, are premising the relief here --

1 JUSTICE THOMAS: So you would --

2 GENERAL PRELOGAR: -- specifically on
3 the HEROES Act.

4 JUSTICE THOMAS: -- you would rely on
5 appropriations from Congress for that, right?

6 GENERAL PRELOGAR: Yes.

7 JUSTICE THOMAS: And the argument is
8 that you are, in effect, doing that without
9 appropriations from Congress?

10 GENERAL PRELOGAR: Well, Justice
11 Thomas, I don't see how you could distinguish
12 that from any of the other forms of relief under
13 the HEROES Act. All of those forms of relief
14 cost the federal government money and often in
15 significant sums.

16 You know, one of the quintessential
17 forms of relief that the government has offered
18 before in periods of extended deferment for
19 soldiers fighting abroad is to pay the interest
20 on their loans for them.

21 And I think you could probably make
22 the same argument of -- of questioning, well,
23 does that cost the government money? Is there
24 an appropriations overlay there? Does that
25 transform the nature of the program because it

1 takes a loan with interest and makes it an --
2 effectively an interest-free loan?

3 But that's exactly what Congress
4 attend -- intended under this authority. It's
5 to make those changes to the program in direct
6 response to and in direct proportion to the
7 situation the Secretary confronts that will
8 otherwise leave that borrower worse off.

9 CHIEF JUSTICE ROBERTS: Justice Alito?
10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Returning to the
12 standing question, the states basically say
13 we're going to lose money in taxation one way or
14 another.

15 In the Texas case, you argued that we
16 should be looking at the cost benefit, and some
17 of the amici here say that there will be a
18 tremendous benefit to the states from this
19 cancellation because that extra money will
20 result in increased consumer spending and
21 decreased housing insecurity, less defaults on
22 other loans that those borrowers may have, et
23 cetera.

24 Do you agree with those amici that the
25 economic benefits outweigh any alleged financial

1 harm in this case?

2 GENERAL PRELOGAR: As a factual
3 matter, we do not disagree. As a legal matter,
4 we haven't asked the Court to rely on that as a
5 basis for standing because we think that the
6 invocation of these harms to tax revenues are so
7 easily answered under this Court's precedent.

8 And I would point the Court to the
9 Pennsylvania versus New Jersey case. It is on
10 all fours with this one, precisely identical.
11 And so we just think you don't need to go down
12 the road of thinking about some of the broader
13 arguments about tax injury in this case because
14 it's so clear that this Court has already
15 rejected the very injury the states are
16 asserting under the Pennsylvania case.

17 JUSTICE SOTOMAYOR: In Pennsylvania,
18 it was a tax credit that was going to be
19 removed, so it's almost identical to this,
20 correct?

21 GENERAL PRELOGAR: Exactly.
22 Pennsylvania had issued its tax credit before
23 the New Jersey law that they were opposed to and
24 had extended it to residents when they pay taxes
25 in other states.

1 And then New Jersey came along and
2 changed its tax code to impose newly a -- a
3 commuter tax that would ultimately deplete
4 Pennsylvania's tax revenues, and the Court said
5 that's self-inflicted because nothing required
6 Pennsylvania to extend that tax credit, nothing
7 prohibits Pennsylvania from withdrawing it now.

8 And that analysis applies equally here
9 because, of course, there is nothing that
10 requires the states to tie their definition of
11 gross income to the federal tax code. Two of
12 the states here, Arkansas and Missouri, don't do
13 that. And there's nothing that prevents them
14 from changing that if they don't want to honor
15 the -- the forgiveness from taxation that the
16 federal government is now under.

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: General Prelogar, I
20 want to change the subject a bit. The -- your
21 friends on the states' side and also the
22 borrowers in the other case have a number of
23 statutory arguments. They frame them as
24 statutory arguments, saying this wasn't
25 necessary under the terms of the statute, saying

1 that it leaves borrowers better off, not worse
2 off, again, pointing to statutory language
3 saying that, you know, it -- the borrowers it
4 targets aren't worse off because of the
5 pandemic.

6 Now I'm not sure that I understand
7 really those arguments as statutory arguments as
8 much as I understand them as arbitrary and
9 capricious arguments, that, essentially, they
10 are saying that the Secretary just did not say
11 the right things, did not make the right
12 findings, did not properly justify what he did
13 here, that there's no sense in which we read
14 this memorandum and we come away thinking, oh,
15 yes, these harms were caused by the pandemic and
16 -- and there's a basis for this action and --
17 and a -- and a sufficient basis for this action.

18 So I wanted to give you a chance to
19 talk about that. It's -- it's essentially the
20 tie to the pandemic of the sort of harms that
21 the Secretary said made relief appropriate.

22 GENERAL PRELOGAR: So let me say at
23 the outset that I agree that those kinds of
24 arguments, I think, find a much more natural
25 home in an arbitrary and capricious analysis,

1 and the reason for that is because it's clear
2 that Congress tolerated overbreadth in this
3 statute. It told the Secretary, for example,
4 that he can act on a class-wide basis. He
5 doesn't need to go case by case with respect to
6 each individual borrower who stands to benefit
7 under HEROES Act relief. It said he should take
8 action to ensure, that is, make certain, that
9 borrowers aren't left worse off as may be
10 necessary, not as strictly necessary.

11 So, once we're in the world where it's
12 clear under the statute that the Secretary isn't
13 violating the HEROES Act by providing relief
14 that's class-wide and may have the effect of
15 offering critical benefits to borrowers who, as
16 it turns out, wouldn't have needed them in the
17 absence of the relief, then I think the question
18 boils down to has the Secretary justified his
19 line-drawing and the scope of relief, and that
20 really should function under arbitrary and
21 capricious review.

22 And, here, I think, with respect to
23 all of the states' arguments, they lack merit
24 when you look at the Secretary's explanation for
25 why this relief, in his judgment, was necessary.

1 He documented the substantial economic impacts
2 of the COVID pandemic across the entire country
3 that's already necessitated unprecedented levels
4 of aid that we've never seen before, \$5 trillion
5 in other pandemic relief efforts, this
6 forbearance policy under the HEROES Act that the
7 Department had never put into place before.

8 So he documented those financial
9 effects the pandemic has had on borrowers, and
10 then he explained, using data that he examined,
11 that huge swaths, substantial percentages of
12 borrowers were going to be at serious risk of
13 default and delinquency or inability to pay
14 their loans once forbearance ends.

15 And that ultimately justified his
16 decision about how to craft the limits within
17 the program and the scope of relief to offer.
18 And I think that all of the states' arguments
19 about how that wasn't strictly necessary or that
20 maybe it doesn't have enough of a connection to
21 the pandemic are answered in full by the
22 Secretary's analysis here.

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: I'd like to follow
2 up on Justice Kagan's question, General.

3 Under State Farm, one of the things
4 that the government must normally do is, in its
5 memoranda, explain not just the benefits of its
6 proposed course of action but also grapple with
7 the costs or negative effects of a program that
8 it proposes.

9 And your friends on the other side
10 argue that that's another deficiency in the
11 Secretary's memorandum, and I'd like to give you
12 the chance to respond to that.

13 GENERAL PRELOGAR: Yes, of course. So
14 I want to say at the outset that my friends are
15 mistaken to suggest that the Secretary didn't
16 even consider costs here. The Department
17 extensively modeled the costs associated with
18 this program and submitted those --

19 JUSTICE GORSUCH: Oh, I -- I -- I --

20 GENERAL PRELOGAR: -- cost estimates
21 to OMB.

22 JUSTICE GORSUCH: -- I'm -- I don't
23 just mean the numbers --

24 GENERAL PRELOGAR: Yeah.

25 JUSTICE GORSUCH: -- but, generally,

1 the -- the negative effects to the economy, to
2 other persons, to people who don't have this
3 opportunity for debt relief. There are a
4 variety of factors that, under State Farm,
5 normally the government would have to consider,
6 and -- and your friends on the other side argue
7 those are not present in this memorandum.

8 GENERAL PRELOGAR: Well, I think that
9 those were -- were certainly part and parcel of
10 the Secretary's determination about how to
11 tailor this relief. The Secretary recognized
12 that the central purpose of the HEROES Act was
13 implicated here because there were going to be
14 millions and millions of student-loan borrowers
15 who were at serious risk of default and who were
16 in a worse position because of the pandemic.

17 But then he decided to tailor the plan
18 to look at those particular risks and decide on
19 the scope of relief to offer those borrowers.
20 And, of course, the costs associated with that
21 are the flip side of providing HEROES Act relief
22 in any circumstance.

23 There are always going to be the --
24 the costs to the government of offering that
25 benefit to borrowers, and it's in line --

1 JUSTICE GORSUCH: Again, not -- not
2 just the costs to the government. I'm sorry to
3 interrupt. But --

4 GENERAL PRELOGAR: Yeah.

5 JUSTICE GORSUCH: -- what I think they
6 argue that is missing is costs to other persons
7 in terms of fairness, for example, people who
8 have paid their loans, people who don't -- have
9 planned their lives around not seeking loans and
10 people who are not eligible for loans in the
11 first place and that a half a trillion dollars
12 is being diverted to one group of favored
13 persons over others.

14 I think that's the nature of their
15 argument, in addition to, as you point out, the
16 cost to the fisc.

17 GENERAL PRELOGAR: The --

18 JUSTICE GORSUCH: And I didn't see
19 anything in the memorandum that dealt with those
20 kinds of questions, and if there is something,
21 I'd be appreciative if you could point me to it.

22 GENERAL PRELOGAR: No, there's not,
23 but that's because I think that those kinds of
24 arguments are inconsistent with the statutory
25 scheme that Congress set up here. Congress

1 already made the judgment that in the context of
2 a national emergency, you should be able to
3 provide borrowers with this kind of relief to
4 serve this purpose.

5 And so I think, for -- for the states
6 to suggest that it's incumbent on the Secretary
7 to say, actually, I'm not going to do that, even
8 though Congress wanted me to ensure that
9 borrowers won't be left worse off, is just at
10 war with the whole statutory purpose.

11 JUSTICE GORSUCH: I appreciate that.

12 Congress has given the executive
13 branch a lot of emergency authority, and I think
14 your argument rests on that. But it also
15 requires generally the President to specify the
16 provisions of law under which he proposes that
17 he or others will act. That's 50 U.S.C. 1631, I
18 think, if my notes are right.

19 And I'm just wondering, did that
20 happen here?

21 GENERAL PRELOGAR: Yes, it did. So
22 the COVID-19 emergency, the specific provisions
23 that he invoked were part of the Social Security
24 Act and HHS's authority to target the spread of
25 disease. I can't give you the exact citation

1 here, but that determination was made.

2 JUSTICE GORSUCH: Did he indicate
3 anything under the HEROES Act or the Department
4 of Education that's acting in this case?

5 GENERAL PRELOGAR: No, but I think
6 that it's clear that the HEROES Act is linked to
7 the declaration of the national emergency, not
8 the other way around.

9 JUSTICE GORSUCH: Okay. And then,
10 finally, on standing, in the New York census
11 case, the majority of this Court held that the
12 failure to count an individual, potential
13 failure to count an individual, undercount the
14 census, would have potential effects to the
15 State of New York in the term -- in terms of the
16 benefits it might later receive. That kind of
17 knock-on effect was sufficient to constitute
18 standing in that case.

19 And I'd just like to get your thoughts
20 on how you'd have us distinguish that.

21 GENERAL PRELOGAR: Sure. So, in that
22 case, of course, the Court was looking at a
23 census count that was going to plug in directly
24 to the amount of federal funding that the state
25 would receive. And I think that, you know, in

1 the kind of terminology that we've been using
2 and thinking about this issue with, that was a
3 direct effect, that, effectively, the action
4 would, by virtue of determining federal funding
5 for the state in that way, operate directly on
6 the state or -- or at least determine its rights
7 and interests.

8 And, here, there's not the same kind
9 of direct effect. Of course, as I've already
10 mentioned to Justice Sotomayor, we think that
11 this is a self-inflicted injury to begin with,
12 so the Court doesn't need to get into those
13 issues. But, even if it does, here, the kind of
14 downstream effects on tax revenues bring this
15 case within Florida versus Mellon as the closest
16 analogue and not Department of Commerce.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: I'd like to pick
21 up on the Chief Justice's and Justice Thomas's
22 questions on statutory text and then our
23 precedent.

24 I think you said earlier what was
25 Congress in 2003 supposed to do in terms of

1 advance authorization. But, of course, they
2 could have in 2003 referred to loan cancellation
3 and loan forgiveness, and those are not in the
4 statutory text.

5 So then that leaves us with a
6 situation that I think we've seen before, an old
7 statute with kind of general language, Congress
8 specifically considering the present issue
9 repeatedly but not, as you acknowledge, passing
10 legislation that would authorize the specific
11 action and then, in the wake of Congress not
12 authorizing the action, the executive,
13 nonetheless, doing a massive new program.

14 And that seems problematic under --
15 going back to the benzene case, the Brown &
16 Williamson, UARG. You know the line of cases.

17 So why did does this case not fit into
18 that formula that we've seen before in prior
19 cases?

20 GENERAL PRELOGAR: So there was a lot
21 packed in there, and I want to be careful and
22 try to respond to each of the considerations you
23 raise because I think, actually, down the line,
24 this case is a far cry from those prior
25 situations the Court has confronted.

1 You mentioned the idea of taking an
2 old statute with, you know, general language or
3 cryptic language and pressing it into service.
4 I don't think that that is a fair
5 characterization of this use of the HEROES Act.
6 The whole point of this statute, its central
7 mission and function, is to ensure that in the
8 face of a national emergency that is causing
9 financial harm to borrowers, the Secretary can
10 do something. He can alter the student loan
11 program to ensure that they're not worse off.

12 So there's not the same mismatch here
13 of taking an old statute and dusting it off and
14 deploying it in a context where Congress could
15 never have imagined it would be used before.
16 Instead, this is a perfect fit with the problem
17 that the Secretary confronted.

18 You also suggested that there would
19 have been a clearer way for Congress to
20 formulate this language, that there's no express
21 reference here. But I think that that doesn't
22 carry a lot of significance in this context
23 because, of course, Congress didn't enumerate
24 any of the possible forms of relief under the
25 HEROES Act. It says that the Secretary can

1 consider waiving or modifying all Title IV
2 provisions.

3 And, certainly, if there was an
4 enumerated list, you might be able to draw
5 inferences from that, but, here, I think the
6 opposite inference applies, that Congress wanted
7 to cover the waterfront and ensure in advance
8 that the Secretary had the tools depending on
9 whatever situation he confronted to make sure
10 that student-loan borrowers weren't going to be
11 left worse off.

12 You mentioned the congressional
13 inaction. And I think that it's true that I
14 acknowledge that that demonstrates that this is
15 a politically significant issue. We have -- we
16 have never contested that point. But there
17 again, as I mentioned to the Chief Justice, we
18 have inaction on both sides.

19 Congress has not amended the HEROES
20 Act and instead enacted the provision of the
21 American Rescue Plan that anticipated this --
22 this program in particular and facilitated it by
23 ensuring that those discharges would not be
24 subject to federal taxation.

25 And then the other thing I would add,

1 you did -- you did not put this in, but if
2 you'll indulge me --

3 JUSTICE KAVANAUGH: Yeah.

4 GENERAL PRELOGAR: -- this is not a
5 situation where the Secretary is acting outside
6 the heartland of his authority. In some of the
7 cases that you've mentioned, you have, you know,
8 concerns that the -- the agency is acting
9 outside the core of its domain, the CDC
10 inserting itself in the landlord/tenant
11 relationship, for example.

12 But that's not what we have here.
13 This is the student loan program. That falls
14 within the wheelhouse of the Secretary of
15 Education. He exercises comprehensive authority
16 over that program. These are federal loans
17 between the federal government and student-loan
18 borrowers. So this is a situation where the
19 Secretary is really acting within the core of
20 his expertise and his authority.

21 JUSTICE KAVANAUGH: Something else you
22 said earlier was that we shouldn't necessarily
23 apply that line of precedent in this situation
24 because this is not a regulatory program but a
25 -- but a benefits program.

1 But I want to push back a little bit
2 on that and get your response, which is, in
3 something like this, there are going to be
4 winners and losers, and that raises similar
5 concerns about individual rights, individual
6 liberty that are present arguably in regulatory
7 programs as well.

8 And why, therefore, wouldn't the same
9 line of precedents that we've applied in the
10 regulatory context apply also in the benefits
11 context to consider whether we need specific
12 express congressional authorization?

13 GENERAL PRELOGAR: Well, I think that
14 at the very least, to the extent that there are
15 those considerations that you referenced,
16 they're not direct in the same way that
17 expansive regulatory authority is.

18 You know, when you've got a government
19 program that is -- as the Court has said before,
20 constitutes extravagant regulatory authority,
21 that takes an identifiable group of individuals
22 or entities and directly imposes burdens or
23 costs on them.

24 And I think there is a distinction
25 with the benefit context when it comes to how

1 Congress is likely to legislate and its general
2 comfort level with broadly empowering the
3 executive to provide benefits to Americans,
4 especially in the context of an emergency
5 situation.

6 But even if you didn't think that that
7 benefits and regulation distinction should carry
8 the day and be a bright-line rule, at the very
9 least, I think it should factor into the
10 analysis when applying interpretive principles
11 here and in looking at what Congress is -- is
12 doing.

13 And as I mentioned before and -- and
14 would love to finish here, you know, think about
15 what Congress is supposed to do. There you are,
16 Congress in 2003, thinking we can't predict the
17 future, we don't know exactly what national
18 emergencies will happen, but we -- what we want
19 to ensure is that we are empowering the federal
20 government to take care of student-loan
21 borrowers and not leave them at substantial risk
22 of being worse off with their ability to repay
23 their loans.

24 And the language that Congress enacted
25 here is a perfect fit to accomplish that goal.

1 And it's hard to see what Congress could have
2 done differently.

3 JUSTICE KAVANAUGH: Last question.
4 Broadening it out and thinking about, you
5 mentioned emergencies, the history of this Court
6 with respect to executive assertions of
7 emergencies.

8 Some of the biggest mistakes in the
9 Court's history were deferring to assertions of
10 executive emergency power. Some of the finest
11 moments in the Court's history were pushing back
12 against presidential assertions of emergency
13 power. And that's continued not just in the
14 Korean War but post-9/11 in some of the cases
15 there.

16 So, given that history, there's a
17 concern, I suppose, that I feel at least about
18 how to handle an emergency assertion. You know,
19 some of the amicus briefs, one of them from a
20 professor says this is a case study in abuse of
21 executive emergency powers. I'm not saying I
22 agree with that. I'm just saying that's the
23 assertion.

24 And I want to get your assessment --
25 this is a big-picture question, so I'll give you

1 a little time -- of how we should think about
2 our role in assertion of presidential emergency
3 power given the Court's history.

4 GENERAL PRELOGAR: Well, I think,
5 in -- in light of that history in all of the
6 contexts that you identified, it's aware the
7 distinction between regulation and benefits
8 really makes a difference. And it actually
9 tracks some of the concerns that have been
10 raised about standing and the Chief Justice's
11 questions about who could actually sue on this
12 plan and what role there is for the judiciary.

13 To the extent that there is a limited
14 category of people who have the actual kind of
15 cognizable Article III harm that would permit
16 standing in a case like this one, I think that
17 just shows that that's because, when the
18 government is administering a benefits program,
19 there are fewer reasons to be concerned that it
20 is going to have the kind of profound burdens
21 or -- or regulatory effects that might prompt a
22 note of caution in other contexts involving
23 exercises of emergency powers.

24 Instead, I think that the
25 considerations all line up on the other side

1 when you think about an emergency situation. It
2 is logical for Congress, in -- in confronting
3 that possibility, to think we want to make sure
4 that without delay the executive branch can take
5 care of Americans and can get them essential
6 benefits.

7 It did so here with language that has
8 many other limitations, so we are not claiming
9 just limitless authority for the federal
10 government to do what it wants in an emergency.

11 The HEROES Act limits the
12 circumstances that can trigger the authority.
13 It says who you can help. It says how you can
14 help them. And it enumerates the purposes that
15 the aid has to serve.

16 So, in all of those ways, Congress can
17 find that authority. But, in a circumstance
18 like this one, where the Secretary has made the
19 findings that without this critical relief for
20 debtors we are going to have a wave of default
21 across the country with all of the negative
22 consequences that has for borrowers, I think it
23 is precisely the type of context where the
24 executive should be able to implement those
25 emergency powers.

1 JUSTICE KAVANAUGH: Thank you very
2 much.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: General, my first
6 question is clarifying because I think I may
7 have misunderstood. You said at the start of
8 your argument that the Secretary both waived and
9 modified.

10 I had understood that the Secretary
11 only relied on the modification in the Federal
12 Register at the relevant cites at 87 Federal
13 Register 61512 and 61514.

14 Is it in those same -- did I just miss
15 in there, did he also specifically say waive?

16 GENERAL PRELOGAR: So I -- I
17 understand where your confusion comes from --

18 JUSTICE BARRETT: Yes.

19 GENERAL PRELOGAR: -- because, at
20 times in the Federal Register, he spoke of
21 modifications and then, if you read down in the
22 next paragraph, he said these waivers will. So
23 I think he was treating these as both waivers
24 and modifications.

25 And the relevant decision memo

1 specifically says, I hereby issue waivers and
2 modifications of the relevant provisions of
3 Title IV. That's at the cite I gave earlier at
4 JA 261. So I would look at that as well to
5 understand what the Secretary was doing.

6 JUSTICE BARRETT: Okay. And to be
7 clear, and I think maybe some of the confusion
8 is waivers. I guess, when I saw that in the
9 language, I thought he was talking -- using
10 waiver as a synonym for cancellation there with
11 respect to the underlying debt, the waiver of
12 the obligation to pay back the principal.

13 And just to be clear, waiver in the
14 statute refers to waiving the statutory and
15 regulatory provisions, not waiving the
16 obligation to repay?

17 GENERAL PRELOGAR: That's correct.
18 So, if you kind of trace through the specific
19 provisions that he invoked, they are statutory
20 and regulatory provisions and they establish the
21 terms of the student loan program and then also
22 deal with discharge and cancellation authority.

23 And he said that he was issuing
24 waivers and modifications of -- of all of those
25 provisions, and I think the right way to

1 conceptualize this is that he was waiving the
2 elements of the discharge and cancellation
3 provisions that are inapplicable in this program
4 that would limit eligibility to other contexts
5 and then modifying the provisions to bring it in
6 line with this program and the -- and the
7 student-loan borrowers who are eligible for
8 relief.

9 JUSTICE BARRETT: So kind of like, if
10 you think of it as red penciling, both deleting
11 and then adding back in, waiving and then
12 putting his own requirements in?

13 GENERAL PRELOGAR: That's right. And
14 the states have suggested there was something
15 improper about adding the requirements in, but
16 the HEROES Act directs him to do this. That
17 subsection (b)(2) specifically says he has to
18 publish the terms and conditions for the loan
19 program that are going to apply in lieu of the
20 waived and modified provision.

21 So there's nothing improper about the
22 Secretary delineating how those waivers and
23 modifications were going to operate.

24 JUSTICE BARRETT: Okay. Next question
25 is also a clarification because I want to be

1 sure I understand your position on Lebron and
2 the overlap potentially between when we're
3 thinking about are you acting as an arm of the
4 government for purposes of say, like in the
5 Amtrak sense, are you bound by the First
6 Amendment, and are -- is MOHELA part of the
7 government of Missouri for purposes of standing.

8 So could MOHELA, say, deny loans to
9 people on the basis of their race or their
10 religion? Would the First Amendment bind
11 MOHELA?

12 GENERAL PRELOGAR: I think that MOHELA
13 likely would qualify as a state actor under the
14 Lebron test, but I don't think that the Lebron
15 test should in any way be controlling for
16 Article III standing purposes.

17 JUSTICE BARRETT: Well, why would that
18 be? How can they be part of the government for
19 purposes of the state action doctrine but then
20 not for purposes of standing? Either they are
21 or they are not part of the government of
22 Missouri, right?

23 GENERAL PRELOGAR: So we're certainly
24 not disputing that they could be, that they're a
25 public instrumentality, that they have

1 governmental functions, and that's the kind of
2 inquiry the Court would engage in to determine
3 whether they're brought within the state action
4 doctrine.

5 But one way to think about this is
6 that the Court, in trying to kind of analyze
7 who's a state actor, has made clear that it
8 would be inappropriate for a state to be able to
9 separately incorporate an instrumentality, for
10 example, and that way evade the strictures of
11 the Constitution. There's kind of a good
12 equitable reason to ensure that states can't
13 thereby unbind themselves from the Bill of
14 Rights with respect to fundamental rights of
15 citizens.

16 Here, I think all of the equitable
17 considerations line up in precisely the opposite
18 direction. We have a situation here where
19 Missouri has benefited from the corporate
20 separateness. It's ensured that it's not going
21 to be responsible for MOHELA's debts. And to
22 now allow it to come in and blur that line and
23 say, actually, you should just treat it and this
24 separate corporation as one and the same would
25 actually produce the kind of inequity that the

1 state action doctrine is guarding against.

2 JUSTICE BARRETT: So two different
3 buckets, three if you throw in sovereign
4 immunity too? You would say one test is for
5 purposes of state action, another test for
6 purposes of sovereign immunity, and another test
7 for purposes of standing?

8 GENERAL PRELOGAR: That's right. And
9 for sovereign immunity, I just want to be clear
10 that we don't think MOHELA actually qualifies as
11 an arm of the state for sovereign immunity
12 purposes because, there, one of the critical
13 factors is whether a lawsuit against the
14 instrumentality can get at the state treasury.
15 And, here, the financial separation makes clear
16 that there is a strict wall and that Missouri's
17 not going to be responsible for MOHELA's debts.

18 Lower courts have gone both directions
19 on this, but we think that under this Court's
20 precedent, MOHELA wouldn't qualify as an arm of
21 the state. Even if it did, though, yes, we
22 think that there is a different inquiry under
23 Article III.

24 JUSTICE BARRETT: Right. Okay. And
25 now I just want to return to Justice Kagan's

1 questions about whether we think about these as
2 statutory arguments or arbitrary and capricious
3 arguments, some of these arguments about are you
4 leaving them worse off or better off.
5 Specifically, I want to focus on the causation.

6 It seems to me that the government's
7 position must be that the HEROES Act permits
8 but-for causation and it doesn't require
9 proximate cause because the Secretary's memo
10 also refers to things like Russia's invasion of
11 Ukraine and, you know, inflation and other
12 things that would -- well, I mean, the invasion
13 of Ukraine has nothing to do with COVID, but the
14 other things that would have a more attenuated
15 relationship to COVID.

16 So is that your position, it would be
17 a but-for?

18 GENERAL PRELOGAR: Yes, that is our
19 position. We think that it should be but-for
20 causation. And the states were challenging that
21 below. They haven't actually revived those
22 arguments here, and I don't understand them to
23 be -- to be urging a different standard, or at
24 least they haven't made that a central aspect of
25 their arguments in the Court.

1 JUSTICE BARRETT: But would that bear
2 on the question of whether this is a statutory
3 interpretation question or not, whether this is
4 within the Secretary's authority? I mean, below
5 the government took the position too that even
6 in 10 years from now it could forgive loans
7 based on COVID if effects were lingering, right?

8 GENERAL PRELOGAR: No. The district
9 court completely misunderstood that colloquy at
10 oral argument. What government counsel said in
11 that oral argument is, if the national emergency
12 is ongoing, if we are still in 10 years in the
13 midst of a raging COVID pandemic and it's
14 producing all of those same harms, he said it
15 would be hard to fathom. And, of course, we
16 know that we are actually as a nation now
17 working to recover from the pandemic. But, in
18 the counterfactual world, as he understood the
19 hypothetical, he said the HEROES Act authority
20 would continue to apply.

21 We are not suggesting that you could
22 have that kind of temporal attenuation from a
23 national emergency and say that, you know,
24 ending today and going forward 10 years from
25 now, you could point back to COVID and this time

1 period as a basis for HEROES Act relief.

2 But, of course, we don't have anything
3 like that. The Secretary acted now in the midst
4 of the pandemic and in -- in recognition that
5 it's time for the forbearance policy to end, but
6 that is going to leave huge numbers of borrowers
7 unable to pay their loans.

8 JUSTICE BARRETT: That's very helpful.
9 Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: Yes. I have two
13 questions, one concrete and one big picture.

14 The concrete question comes from a
15 statement that you make in your reply brief
16 about MOHELA standing to earn offsetting fees.
17 Can you spell out what those -- and by that, I
18 mean offsetting fees from the discharges so that
19 we aren't even really sure, you know, what the
20 net loss would be.

21 Can you spell out a little bit more
22 about those?

23 GENERAL PRELOGAR: Yes. So, under the
24 Department's contracts with MOHELA, MOHELA
25 receives fees for discharging accounts. And we

1 were making the point that, here, Missouri
2 hasn't come forward with any allegations that
3 MOHELA will actually, sum total, suffer
4 financial injury under this plan.

5 And this is all just in service of
6 making the broader point that any financial
7 effects downstream on the state here are
8 attenuated and speculative.

9 JUSTICE JACKSON: So we don't know
10 really what the ultimate loss would be to
11 MOHELA, even if we believe that MOHELA is part
12 of the state?

13 GENERAL PRELOGAR: That's right. The
14 states haven't offered any evidence in that
15 regard to substantiate their assertion of
16 standing.

17 JUSTICE JACKSON: All right. And --
18 and I also have a big-picture question about
19 standing. You've been arguing that standing
20 here would be a reach if we were to, for
21 example, find that, you know, MOHELA somehow --
22 losses to it count for the purposes of the state
23 based on established standing principles.

24 And what I've been mulling and
25 wondering is whether the same concerns about the

1 political significance of this case that the
2 Chief pointed to could be a reason for us to
3 hold the line in terms of thinking about our
4 standing doctrine and whether or not we should
5 expand it in this area.

6 I understood that the standing bar
7 really, you know, as applied in a case like
8 this, would allow the political branches to hash
9 this out without interference, you know, from a
10 torrent of lawsuits brought by states and
11 entities and individuals who don't have a real
12 personal stake in the outcome. And, in some
13 ways, it's not unlike a case we heard last week
14 where people were very concerned about, you
15 know, lawsuits against tech companies and how
16 they might hobble these companies if we allowed
17 them to go forward.

18 And I guess I have that same worry
19 about the operation of the federal government
20 and -- and its ability to govern. If we look at
21 our standing doctrine in cases like this and we
22 find that, you know, even the most minor state
23 interest, a dormant fund that hasn't been, you
24 know, funded or used by the state in 15 years,
25 if that can be the basis for standing, I guess

1 I'm concerned that we're going to have a problem
2 in terms of -- of -- of the federal government's
3 ability to operate.

4 So my question is, is this a
5 legitimate concern and should we think -- be
6 thinking in cases like this about that type of
7 concern as we ponder whether to expand our
8 standing doctrines?

9 GENERAL PRELOGAR: I think it is a
10 legitimate concern. The Court has never
11 suggested before that it should alter ordinary
12 Article III principles and allow plaintiffs to
13 sue based on concerns about the significance of
14 the action.

15 And, in fact, the Court has said again
16 and again that the fact that no one might have
17 standing to sue about an action doesn't mean
18 that you should alter Article III and allow a
19 suit to proceed, because the judiciary doesn't
20 sit as a roving commission to rule on the
21 legality of either Congress's enactments or the
22 executive's implementation of those enactments.

23 But I think it would be particularly
24 anomalous in this case to accept any of the
25 states' attenuated theories of standing because

1 there isn't even a situation where there's no
2 other identifiable plaintiff or possibility to
3 have the -- the courts weigh in on these issues.

4 The problem here is that the states
5 aren't the proper plaintiff to bring this suit.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 General.

9 General Campbell.

10 ORAL ARGUMENT OF JAMES A. CAMPBELL

11 ON BEHALF OF THE RESPONDENTS

12 MR. CAMPBELL: Mr. Chief Justice, and
13 may it please the Court:

14 The Secretary is attempting to bypass
15 Congress on one of today's most debated policy
16 questions, student loan forgiveness. After many
17 failed legislative efforts, the Secretary seeks
18 to write off nearly a half trillion dollars in
19 loans for over 40 million borrowers. No statute
20 authorizes this sweeping action.

21 On standing, Missouri has the right to
22 vindicate the harms to MOHELA. MOHELA is a
23 state-created and state-controlled public
24 instrumentality that performs the essential
25 public function of providing financial aid to

1 Missouri students.

2 The Secretary's program threatens to
3 cut MOHELA's operating revenue by 40 percent.
4 That will directly undermine MOHELA's ability to
5 further its critical public purposes, and the
6 state has standing to assert those harms.

7 On the merits, this is a major
8 questions case. A nearly half trillion dollar
9 debt cancellation program is undoubtedly a
10 matter of vast economic and political
11 significance. It is also unprecedented. Never
12 before has the HEROES Act been used to forgive a
13 single loan.

14 In addition, the Secretary here
15 asserts a breathtaking power, to do anything
16 that he thinks might reduce the risk of
17 borrowers defaulting, even years after a
18 national emergency arises. He needs clear
19 congressional authorization for such power, but
20 he doesn't have it here because the HEROES Act
21 does not authorize this program.

22 The Act permits the Secretary to waive
23 or modify existing provisions because of a
24 national emergency. It does not permit him to
25 rewrite existing provisions to create a new

1 program that covers 95 percent of borrowers and
2 applies to them regardless of how the pandemic
3 affected them.

4 This Court should declare this program
5 unlawful, and I welcome the Court's questions.

6 JUSTICE THOMAS: General, I think, at
7 the beginning, you should comment some on the
8 relationship between MOHELA and the State of
9 Missouri, primarily, the -- as you've heard, the
10 effect of this forgiveness program on MOHELA
11 and, by extension, on the State of Missouri for
12 the -- at least to establish standing.

13 MR. CAMPBELL: Sure, Justice Thomas.
14 To start with the effect on MOHELA, so MOHELA
15 approximately -- as of last fiscal year,
16 77 percent of its operating revenue came from
17 servicing direct loans.

18 The Secretary tells us that nearly
19 half of all loans -- all borrowers' loans will
20 be discharged under this program. So it stands
21 to reason that about half of MOHELA's operating
22 revenue from direct loans will be cut, and,
23 overall, that amounts to about 40 percent of its
24 operating revenue.

25 Now Justice Jackson asked the question

1 about whether there are offsetting fees. It --
2 it's very hard to believe, and the government
3 doesn't offer any details in its reply brief,
4 that a one-time payment of fees for discharging
5 loans will offset the ongoing fee that MOHELA
6 earns from servicing those loans. So --

7 JUSTICE JACKSON: But isn't that your
8 burden? I mean, I -- I understood the
9 government to say that you are bringing this
10 lawsuit and you have to establish standing.

11 And so, to the extent we're trying to
12 assess whether or not MOHELA is actually going
13 to be injured, I -- I don't think you can answer
14 but the government hasn't said something about
15 the fees.

16 MR. CAMPBELL: Well, the -- my point
17 in bringing that up, Justice Jackson, is that
18 the government hasn't -- hasn't said anything
19 about the fees in responding to what we've
20 already substantiated through the documents
21 we've put in.

22 We have put in documents indicating
23 that this will amount to approximately a
24 40 percent loss of operating revenue for MOHELA.
25 And, in response, the government referenced

1 potential offsetting costs, which they don't
2 quantify, and they don't show that that would
3 significantly reduce the injury that we're
4 anticipating. Now --

5 JUSTICE KAGAN: MOHELA isn't here,
6 General Crawford, is that correct?

7 MR. CAMPBELL: MOHELA is not here, but
8 --

9 JUSTICE KAGAN: It has the ability --

10 MR. CAMPBELL: -- its interests are
11 here.

12 JUSTICE KAGAN: -- to sue and be sued.
13 It's been set set up as an independent corporate
14 entity with the ability to bring suits on its
15 own. Usually, we don't allow one person to step
16 into another's shoes and say I think that that
17 person suffered a harm, even if the harm is very
18 great. We -- we -- we -- we leave it to the
19 person, him or her or itself, to make that
20 judgment.

21 Now, here, the state has derived very
22 substantial benefits from setting up MOHELA as
23 an independent body with financial distance from
24 the state and sue and be sued authority. So why
25 isn't MOHELA responsible for deciding whether to

1 bring this suit?

2 MR. CAMPBELL: We don't deny that
3 MOHELA has -- could file a suit like that, but
4 the state's interest is directly implicated
5 here, so it is allowed to assert the interests
6 it has in MOHELA directly.

7 JUSTICE KAGAN: Well, I guess -- I
8 mean, there are third parties all the time who
9 have an interest in, gosh, I -- I wish that
10 party over there would bring a suit because I
11 have some relationship with that third party and
12 I would like it very much if that third party
13 represented its own interests better in my view.

14 But we don't do that. We -- we -- we
15 -- we don't allow that kind of interference with
16 the decision of the entity involved to decide
17 whether the harm is of the kind that -- that
18 they want to sue for.

19 MR. CAMPBELL: Well, the government is
20 different. This Court has recognized that in
21 cases like Cherry Cotton Mills and Erickson,
22 where it's allowed the federal government to
23 assert the interests of federally created
24 corporations.

25 JUSTICE KAGAN: I -- I -- I believe

1 that in those cases the federal government had
2 an independent interest. So the federal
3 government was not saying, oh, we just have an
4 entitlement to stand in the shoes of the -- the
5 federal corporation.

6 MR. CAMPBELL: Two -- two responses.
7 The first response is I don't think that's the
8 best reading, certainly, of Cherry Cotton Mills.
9 Cherry Cotton Mills, the Court discussed a
10 number of facts and then at the end said the
11 reason why the government can assert the federal
12 corporation's interest is because it is
13 performing purely governmental purposes.

14 That's exactly what's happening here.
15 The State of Missouri has declared that
16 everything MOHELA does is the performance of an
17 essential public function. So that's the first
18 response.

19 The second response is, even if the
20 state does need an interest, the state has an
21 interest here. I'd identify at least three.

22 The first interest is that the state
23 created MOHELA to provide financial aid for
24 Missouri students and that's what it does. The
25 second interest is in the Lewis and Clark

1 Discovery Fund. And the third interest is in
2 the regular contributions that MOHELA makes to
3 the state scholarship programs.

4 Now there was some discussion early --
5 earlier about the Lewis and Clark Fund and some
6 suggestion that it's a dormant fund that no
7 longer exists. I -- I think it's clear -- I --
8 I think we need to clarify what exactly is the
9 status.

10 So, yes, it's true that there hasn't
11 been a contribution in the last 15 years, but
12 that's because the state has negotiated with
13 MOHELA for MOHELA, in lieu of making the Lewis
14 and Clark contributions, to contribute over \$65
15 million directly to the state scholarship
16 program. And in exchange for those agreements,
17 the -- the state has allowed the Lewis and Clark
18 deadline to be extended.

19 So, at this point, the question is,
20 what's going to happen at the next deadline?
21 The next deadline is coming up next year. And
22 if -- the question before this Court is whether
23 cutting MOHELA's operating revenue by 40 percent
24 will increase the risk that it either won't make
25 the next contribution to the Lewis and Clark

1 Fund or it won't make the next payment to the
2 scholarship fund in lieu of the Lewis and Clark
3 Fund.

4 JUSTICE BARRETT: That's --

5 JUSTICE SOTOMAYOR: That seems --

6 JUSTICE BARRETT: -- what's most
7 important to you now is the Lewis and Clark
8 Fund?

9 MR. CAMPBELL: No, it's not, Your
10 Honor. What's most important to us is that the
11 state can speak directly for MOHELA, but I was
12 responding to the question about the interest
13 that --

14 JUSTICE BARRETT: I guess I understood
15 the interests to be, if MOHELA was really
16 Missouri, the loss of the servicing fees. Am I
17 misunderstanding that?

18 MR. CAMPBELL: No, you're not --

19 JUSTICE BARRETT: You have two
20 different arguments, right?

21 MR. CAMPBELL: That's correct.

22 JUSTICE BARRETT: You have that
23 argument and then you have this argument about
24 the Lewis and Clark Fund.

25 MR. CAMPBELL: That -- that's correct.

1 My first response to Justice Kagan, I was trying
2 to focus on the first theory, and then the
3 second response, where I got into the Lewis and
4 Clark Fund, I was responding under the second
5 theory.

6 JUSTICE BARRETT: All right. So let's
7 --

8 JUSTICE SOTOMAYOR: On the first
9 theory, it's hard to imagine how the State of
10 Missouri can claim an injury, putting the Lewis
11 and Clark and the scholarship issues aside, when
12 it's not responsible for the debts of MOHELA,
13 it's not responsible for the contracts it enters
14 into, it doesn't own the assets of that
15 corporation.

16 There is on paper no financial
17 obligation by the state or loss to the state by
18 anything MOHELA does or anything it gets.
19 I'm -- I'm putting aside Lewis and Clark. It's
20 hard -- it's just very hard for me to say that
21 there is an interest sufficient for the state to
22 speak on behalf of an entity who has a right to
23 sue or be sued.

24 MR. CAMPBELL: When this Court in
25 Lebron and when the Missouri Supreme Court in

1 Casualty Reciprocal Exchange consider whether an
2 entity is a part of the government, it looks at
3 a far more --

4 JUSTICE SOTOMAYOR: But those are --

5 MR. CAMPBELL: -- broad analysis.

6 JUSTICE SOTOMAYOR: -- different --
7 those are different issues. Standing has to do
8 with injury. It doesn't have to do with are you
9 evading the Constitution, are you trying to
10 delegate public functions. Those are all -- are
11 you immune because you are acting in a way that
12 only a state can. Those are very, very
13 different questions.

14 This is the question of standing,
15 which relies on injury in fact. How can you
16 have -- I'm putting Lewis and Clark aside -- how
17 can you have injury in fact if you immunize --
18 you, the state, have immunized yourself from any
19 liability or any injury that MOHELA can
20 experience?

21 MR. CAMPBELL: Because the state
22 speaks for MOHELA. The state represents
23 MOHELA's interests.

24 JUSTICE SOTOMAYOR: Well, it decided
25 to give this entity the right to sue and be

1 sued. So it -- it chose to say I'm not injured
2 in fact. Speaking is not the same as injury.

3 MR. CAMPBELL: Your Honor, the -- the
4 federally created corporations in Cherry Cotton
5 Mills and Erickson also had the right to sue and
6 be sued, but that didn't stop the federal
7 government from asserting their interests.

8 In addition, if we're focusing just on
9 the right to sue or be sued, the Secretary has
10 the right to sue or be sued. That doesn't
11 disable the Department of Justice for -- from
12 speaking for their interests.

13 JUSTICE SOTOMAYOR: Now let's go back
14 to Lewis and Clark a moment. The arrangement
15 that MOHELA and the state engaged in predated
16 the pandemic, correct? It started in 2009,
17 2010?

18 MR. CAMPBELL: The Lewis and Clark
19 Fund started --

20 JUSTICE SOTOMAYOR: Yes. The --

21 MR. CAMPBELL: -- in --

22 JUSTICE SOTOMAYOR: -- suspension of
23 MOHELA's contributions to it, correct?

24 MR. CAMPBELL: Started in 2008.

25 JUSTICE SOTOMAYOR: Isn't it a series

1 of speculations that in 2004, absent this
2 program, that the state won't continue that
3 arrangement it currently has and continue to
4 defer obligations?

5 MOHELA said that it -- MOHELA has
6 already said publicly that it doesn't think that
7 contributions to the Lewis and Clark Fund are
8 within its wheelbarrow obligations. That was
9 one of the reasons this arrangement has been
10 made, correct?

11 MR. CAMPBELL: Well, MOHELA recognizes
12 that it still owes \$105 million to the Lewis and
13 Clark Fund.

14 JUSTICE SOTOMAYOR: Well, it's -- in
15 fact, I understand it's not writing it off as an
16 obligation anymore.

17 MR. CAMPBELL: But it still --

18 JUSTICE SOTOMAYOR: It doesn't carry
19 it on its books anymore.

20 MR. CAMPBELL: Your Honor, if you look
21 at page 20 through 21 of the financial statement
22 we cite in our brief, MOHELA acknowledges that
23 it still owes \$105 million to that fund.

24 And the point that I was making
25 earlier is that the fund -- contributions to the

1 fund and contributions to the scholarship
2 program are different sides of the same coin.
3 The state has been constantly -- throughout the
4 entire time from 2007 until now, has been
5 constantly receiving payments from MOHELA, and
6 those payments have taken the form sometime of
7 Lewis and Clark, but more -- more often
8 recently, it has taken the form of a scholarship
9 contribution.

10 JUSTICE JACKSON: Have you expressed
11 any plans to actually use the fund to pursue
12 projects in the foreseeable future, and, if so,
13 what projects?

14 MR. CAMPBELL: At this point, the
15 projects have been put on pause.

16 JUSTICE JACKSON: I see. So we're
17 talking about a fund that hasn't been
18 contributed into because the state has waived
19 the obligation to do so for at least a temporary
20 period of time, and then, even if the funds were
21 to go into this particular fund, you don't have
22 a set of plans that you are planning to pursue
23 with them?

24 MR. CAMPBELL: But all that requires
25 is the legislature and the governor to move

1 forward once the money -- once the fund has been
2 funded.

3 JUSTICE JACKSON: Yes. No, I
4 understand, but we're trying to figure out the
5 degree to which the state is injured by the
6 money not being there. And so, on the one hand,
7 you know, I hear Justice Sotomayor exploring
8 with you the fact that the state has allowed the
9 money not to be there in the recent past by
10 saying don't worry, you don't have to put it in
11 there, MOHELA. So that seems to be a sort of
12 strike against the state now saying we're so
13 injured because the money isn't there.

14 And then we have on top of that your
15 representation here that the state isn't even
16 actively seeking or interested in the money
17 insofar as it's decided that it's going to
18 engage in some sort of project that we need the
19 money for.

20 So I'm just wondering about the
21 speculative, attenuated nature of the harm that
22 you're alleging on the basis of there not being
23 -- or of the risk that we won't have extra money
24 put into this fund.

25 MR. CAMPBELL: Your Honor, I -- I

1 disagree with -- with what you said, that the
2 state has waived the obligation under the fund.
3 What the state has done is it's engaged in a
4 quid pro quo discussion with MOHELA, and it has
5 said that in exchange for \$65 million in
6 payments to the scholarship fund, it has allowed
7 the -- the timeline to be extended. That's not
8 a waiver.

9 JUSTICE JACKSON: Yes, I apologize.
10 I'm just saying the state has not pressed MOHELA
11 to put money into the fund, right?

12 MR. CAMPBELL: Because it -- correct,
13 but because it has been receiving money in
14 another fund all along.

15 JUSTICE JACKSON: I -- I appreciate
16 that, but I guess I'm just still trying to
17 understand how you can look at that fund as the
18 basis for the injury that you're claiming with
19 respect to this particular plan.

20 MR. CAMPBELL: Your Honor, because the
21 next due date for the fund is a year from now.

22 JUSTICE JACKSON: And you can't extend
23 it?

24 MR. CAMPBELL: It can be extended, but
25 that would be in exchange for them giving

1 another contribution to a scholarship fund,
2 which is further showing that there are further
3 financial contributions coming.

4 JUSTICE JACKSON: And there -- the
5 plan is not totally ridding them of any
6 opportunity to make money, so they do have some
7 other income, yes?

8 MR. CAMPBELL: MOHELA?

9 JUSTICE JACKSON: Yes.

10 MR. CAMPBELL: Whether MOHELA has
11 other --

12 JUSTICE JACKSON: Yes.

13 MR. CAMPBELL: Yes, MOHELA has other
14 --

15 JUSTICE JACKSON: All right. So we
16 could believe that the income that MOHELA gets
17 from its other sources of revenue could be used
18 to pay off in a year the -- the amount that the
19 state says it requires in order to put off the
20 obligation yet again, right?

21 MR. CAMPBELL: I -- I don't -- I don't
22 think -- well, here's the key point in response:
23 What MOHELA says in the letter that the
24 government filed as supplemental authority with
25 the Eighth Circuit is that they take all

1 available funds beyond their expenses and
2 reasonable reserves and they devote them to
3 student financial aid in Missouri.

4 So, if their operating revenues are
5 cut by 40 percent, we know what they do with the
6 money at the top, the excess money. They give
7 it to students attending school in Missouri.
8 So, if their operating revenues go down, that's
9 the first thing that's going to go.

10 JUSTICE BARRETT: General, I'd like to
11 put aside the Lewis and Clark Fund for a minute,
12 and I want to return to the direct injury
13 argument, the MOHELA is an arm of the state
14 argument.

15 Justice Sotomayor was pointing out
16 statutorily MOHELA has the right to sue and be
17 sued, the state doesn't have responsibility for
18 its liabilities, and the state has disclaimed
19 any -- any claim to the assets.

20 Is that correct?

21 MR. CAMPBELL: I would disagree with
22 the last point. I don't think --

23 JUSTICE BARRETT: Okay.

24 MR. CAMPBELL: -- the state has
25 disclaimed any interest in the assets.

1 JUSTICE BARRETT: So explain to me why

2 --

3 MR. CAMPBELL: I --

4 JUSTICE BARRETT: -- because, on the
5 one hand, you have -- you know, in Missouri
6 Statute 173.420, you have -- the last sentence
7 says that nothing in these sections shall be
8 construed to deprive the state and its
9 governmental subdivisions of their respective
10 powers over assets of the authority. But then,
11 in the next section, 425, it says no asset of
12 the authority shall be considered to be part of
13 the revenue of the state.

14 So which is it? I mean, because it
15 would be hard to see how a win for the state
16 would benefit MOHELA or a win for MOHELA would
17 benefit the state if the assets are completely
18 separate. You don't get any money out of it,
19 putting aside Lewis and Clark because I'm not
20 really interested in that.

21 MR. CAMPBELL: So, Your Honor, to --
22 to go to the second provision you read, 425, it
23 says no asset of the authority shall be
24 considered to be part of the revenue of the
25 state within the meaning of a specific state

1 constitutional provision.

2 So I would then say --

3 JUSTICE BARRETT: Okay.

4 MR. CAMPBELL: -- that's only for a
5 limited purpose. The prior provision that you
6 read, where the state has preserved its
7 authority over MOHELA's assets, shows that any
8 residual interest in MOHELA's assets belongs to
9 the state.

10 So we cited the Reciprocal Casualty
11 Exchange case in our brief that shows that the
12 legislature could abolish an entity like MOHELA,
13 and if it did, the money would come back to the
14 state. So the state does have the ultimate
15 interest in the property of MOHELA.

16 JUSTICE BARRETT: If the state wanted
17 money from MOHELA right now, if the state just
18 wanted to pull assets out, say, because the
19 state was going to make a decision to fund the
20 Lewis and Clark Fund, does the state have the
21 authority to do that?

22 MR. CAMPBELL: Acting through the
23 legislature, it does.

24 JUSTICE BARRETT: Okay.

25 MR. CAMPBELL: Acting -- and -- and I

1 think the Lewis and Clark Fund is actually a
2 great example of that. So the Lewis and Clark
3 Fund wasn't created until 26 years after MOHELA
4 began its operations, and at that point, the
5 legislature came in and said, MOHELA, you have
6 to start giving this source of funding to the
7 state. So the legislature can come in at any
8 time and -- and request money.

9 JUSTICE BARRETT: Do you want to
10 address why MOHELA's not here?

11 MR. CAMPBELL: MOHELA is not here
12 because the state's asserting its interests.
13 MOHELA doesn't need to be here because the state
14 has the authority to speak for them. And that
15 brings me to --

16 JUSTICE BARRETT: Why didn't the state
17 just make MOHELA come then? If -- if MOHELA is
18 really an arm of the state and all of this would
19 be a lot easier -- I mean, the Solicitor General
20 conceded that if MOHELA was here, MOHELA would
21 have standing. If MOHELA is an arm of the
22 state, why didn't you just strong-arm MOHELA and
23 say you've got to pursue this suit?

24 MR. CAMPBELL: Your Honor, that's a
25 question of state politics, but we believe as a

1 matter of law that the state has the authority
2 to assert its interests. Under the factors in
3 Lebron, under the factors that the state --
4 Missouri state supreme court recognized in
5 Casualty Reciprocal Exchange, if it's a
6 state-created and state-controlled entity that
7 performs government functions, the state can
8 speak for it regardless --

9 JUSTICE KAGAN: Just -- just along the
10 same lines, I mean, it's true that you couldn't
11 even get documents from MOHELA without file --
12 filing the state equivalent of a FOIA request.

13 MR. CAMPBELL: Your Honor, that was
14 the -- the mechanism by which we went about
15 acquiring the documents, but that just further
16 --

17 JUSTICE KAGAN: Well, that was the
18 mechanism. I think that if MOHELA was willing
19 to hand you over the documents, you wouldn't
20 have filed a state FOIA request.

21 MR. CAMPBELL: Your Honor, I think
22 that further shows that MOHELA is a state
23 entity. They're subject to public records laws.
24 They're subject to open meeting laws. They are
25 a entity of the State of Missouri.

1 JUSTICE JACKSON: And when you say
2 acting through the legislature in response to
3 Justice Barrett, do you mean that sort of the
4 structure of MOHELA would have to be revisited
5 through the legislature? In other words, you've
6 now set it up -- we have a law in Missouri that
7 structures this corporation in a certain way,
8 and it is separate.

9 So, when you say acting through the
10 legislature, do you mean that there would have
11 to be some kind of amendment to the way in which
12 MOHELA is and operates in order to allow for you
13 to reach its assets?

14 MR. CAMPBELL: I think it would have
15 to be an act of the legislature. Whether it
16 took the form of amending the existing statutes
17 or whether it was a new statute, it would have
18 to be an act of the legislature.

19 JUSTICE GORSUCH: Counsel, on the
20 merits, if I could direct you to the Solicitor
21 General's argument suggesting the major
22 questions doctrine does not apply because this
23 is a benefits program, despite our -- our
24 holding in King versus Burwell, and -- and
25 arguing that it doesn't implicate the

1 Appropriations Clause authority of Congress.

2 Can you address that argument, please?

3 MR. CAMPBELL: Yes, Your Honor. The
4 whole point of the major questions doctrine is
5 to preserve the separation of powers, and it
6 rests on the presumption that Congress intends
7 to address major questions for itself.

8 JUSTICE GORSUCH: I understand that.
9 But this is a more specific question with
10 respect to benefits programs --

11 MR. CAMPBELL: Right.

12 JUSTICE GORSUCH: -- and the
13 relationship between it and the Appropriations
14 Clause and King versus Burwell.

15 MR. CAMPBELL: Your Honor, the reason
16 why I referenced the underlying doctrine and why
17 it exists is that those same reasons apply in
18 this benefits context no less than they do in a
19 different regulatory context. The separation of
20 powers is implicated here because we're dealing
21 with a congressionally created program.

22 In addition, if anything, I would say
23 that there are more reasons to apply the major
24 questions doctrine here, because what the agency
25 is effectively doing is exercising the power of

1 the purse by going into the federal balance
2 sheet and crossing off nearly a half trillion
3 dollars in loans payable to the government.

4 That is a quintessentially legislative
5 function. So that's even more reason why the
6 major questions doctrine should apply.

7 JUSTICE KAVANAUGH: Isn't the -- well,
8 do you have --

9 JUSTICE SOTOMAYOR: I was just going
10 to ask, that's the whole purpose of the HEROES
11 Act. The whole purpose of the HEROES Act is to
12 say in -- either for veterans or -- not for
13 veterans, for people who are in military service
14 or in a national emergency, we give you the
15 authority to impose debt on us.

16 The forbearance of payment is -- is it
17 5 billion a month or something like that? It's
18 an outrageous sum. And yet that isn't -- no one
19 is disputing that the Secretary -- that the
20 Secretary has that power. It's not the amount
21 of money. The question is what's Congress's
22 intent.

23 And we know from the HEA Act that
24 Congress recognized that there would be
25 cancellation of debt for schools that close at

1 least. Why would you think that Congress didn't
2 intend under the HEROES Act to permit
3 cancellations of debt if a national emergency
4 required it?

5 MR. CAMPBELL: Because what Congress
6 said in the HEROES Act is that the Secretary has
7 the power to waive or modify existing
8 provisions. It did not give the Secretary the
9 power to rewrite --

10 JUSTICE SOTOMAYOR: But all of those
11 waiver --

12 JUSTICE KAGAN: Well, yes, it did.
13 Sorry. May I?

14 JUSTICE SOTOMAYOR: Go ahead. Yes.

15 JUSTICE KAGAN: General Campbell, I
16 mean, it -- it says waive or modify any
17 statutory or regulatory provision applicable to
18 the student financial assistance programs, and
19 then it says the Secretary can add terms and
20 conditions to be applied in lieu of such
21 statutory and regulatory provisions.

22 So it's really quite clear here, it's
23 like you can waive or modify the old ones, and
24 then you can add new ones in lieu of the old
25 ones. So, you know, Congress could not have

1 made this much more clear.

2 I mean, Congress didn't say exactly
3 the circumstances in which it wanted the
4 Secretary to use this authority. Of course not.
5 This is -- this is a -- a bill about, like, what
6 happens when you have an emergency.

7 So what Congress said is what happens
8 when you have an emergency is the Secretary has
9 the power to take care of emergencies, and it
10 has that power by way of waiving or modifying
11 any provision and adding others in lieu of them.

12 MR. CAMPBELL: A couple responses.

13 The adding in lieu of language, that
14 has to be understood to mean adding along the
15 lines of a modification. It can't be adding
16 just anything the Secretary wants. It has to be
17 read in context with the terms --

18 JUSTICE KAGAN: Or a waiver.

19 MR. CAMPBELL: -- waive or modify.

20 JUSTICE KAGAN: Or a -- and, you know,
21 it's not just modify, it's waived. So it's
22 modify even if we take a kind of MCI-type
23 reading of modify, all -- you know, through more
24 major changes, all the way up to waive, and then
25 you can say what terms and conditions should be

1 applied in lieu of those provisions.

2 Congress doesn't get much clearer than
3 that. We -- we deal with congressional statutes
4 every day that are really confusing. This one
5 is not.

6 MR. CAMPBELL: Your Honor, I -- I
7 disagree that what we're dealing with here is a
8 waiver or modification. Three points on waiver.

9 In terms of when -- when we look at
10 the -- the publication in the -- in the Federal
11 Register, it says the Secretary modifies the
12 following provisions. So the Secretary didn't
13 even purport to waive the loan discharge
14 provisions that were cited.

15 Second point, that makes sense because
16 the Secretary wasn't actually excusing
17 compliance with any of the existing
18 requirements. The Secretary was ignoring all of
19 those requirements and creating brand-new ones
20 to -- to put in place a brand-new program.

21 And the third point is, again, we know
22 that there was no waiver here because affected
23 individuals can continue to access all those
24 existing loan discharge programs.

25 If somebody qualifies for the public

1 loan service program, they're able to access it
2 right now. So there was no waiver here. All we
3 have is an attempt to modify, but this goes far
4 beyond a modification because it -- it is the
5 creation of a brand-new program that goes far
6 beyond what Congress intended.

7 In fact, if Congress --

8 JUSTICE KAGAN: Do you think that
9 there is an ability to modify provisions
10 respecting discharge? So, you know, is there
11 any ability? Because there are these -- these
12 particular discharge provisions, right, and it
13 has to do with death and with when your school
14 closes and so forth.

15 So suppose the Secretary says, that's
16 not enough, I want to do some more.

17 MR. CAMPBELL: Your -- Your Honor, I
18 think there's a good example where the
19 Secretary's done it in the past that was
20 acceptable. So, in 2003, the Secretary used the
21 power under the HEROES Act to modify an existing
22 requirement to access student loan and it was
23 under one of those profession-based programs
24 where, if you work for a teacher for a certain
25 amount of years, you can get into the program.

1 JUSTICE KAGAN: So let me give you an
2 example. Suppose, like, there's an earthquake.
3 We'll use an earthquake instead of a pandemic.
4 And the Secretary says this isn't enough, people
5 are -- are really being hurt by this. So we
6 have a provision about the borrower dying. The
7 Secretary says, I'm also going to allow
8 dischargers where the primary earner in the
9 borrower's household dies.

10 Could the Secretary do that?

11 MR. CAMPBELL: Your Honor, I don't
12 believe so because it doesn't sound like a
13 modification of an existing program. It sounds
14 like the creation of a brand-new program.

15 JUSTICE KAGAN: Really, just from the
16 borrower dying, the Secretary is allowed to do
17 that, but the Secretary in -- in -- in -- in the
18 face of this massive earthquake is not allowed
19 to say, you know, or not just the borrower but
20 the -- the -- the primary earner in the
21 borrower's family?

22 MR. CAMPBELL: Your Honor, the
23 question would come down to whether that is a
24 modification. It sounds to me like it might go
25 too far because it's creating a new program.

1 But even if that was --

2 JUSTICE KAGAN: I mean, this is very
3 broad language, go -- go modify or waive any
4 statutory or regulatory provision and come up
5 with new ones, and you're not even going to
6 allow me that?

7 MR. CAMPBELL: Your Honor, I was going
8 to say, even if that would be sufficient here,
9 it's nothing like this program. This is a
10 program that includes 95 percent of borrowers
11 regardless of how they were affected by the
12 pandemic. So we --

13 JUSTICE KAGAN: Could the Secretary
14 say, well, there was this terrible earthquake
15 and lots of people's houses were destroyed, and
16 so I'm going to discharge the loans of people
17 whose houses were destroyed in this terrible
18 earthquake?

19 MR. CAMPBELL: Your Honor, it sounds
20 to me like creating a new program. I don't
21 think that that would be okay under the HEROES
22 Act. Now what I would say --

23 JUSTICE KAGAN: See, I -- I -- I -- I
24 guess, you know, this is an emergency provision.
25 There's an emergency. It's an earthquake. You

1 don't think Congress wanted to give -- and --
2 and not just wanted. It's not what Congress
3 thought. It's what Congress said, to give the
4 Secretary power to say, oh, my gosh, people have
5 had their homes wiped out, we're going to
6 discharge their student loans.

7 MR. CAMPBELL: Your -- Your Honor,
8 when it comes to taking that ultimate step to
9 discharging loans, Congress wanted to preserve
10 that for itself. And I think we note -- we --
11 Congress acts in pandemics --

12 JUSTICE KAGAN: Where do you see that
13 in this statute? I mean, the -- the provision
14 of the statute says any statutory or regulatory
15 provision applicable to the student loan program
16 you can waive, you can add another, to deal with
17 an emergency.

18 This isn't a massive delegation to the
19 Secretary of Education. It's -- it's designed
20 to deal with emergency conditions. You have a
21 lot of power in emergencies. When those
22 people's homes are destroyed, you have the power
23 to -- to discharge their loans.

24 MR. CAMPBELL: But Congress still has
25 a voice in emergencies, and we see that through

1 the CARES Act here.

2 JUSTICE KAGAN: Congress used its
3 voice. Congress used its voice in enacting this
4 piece of legislation. All this business about
5 executive power, I mean, we worry about
6 executive power when Congress hasn't authorized
7 the use of executive power.

8 Here, Congress has authorized the use
9 of executive power in an emergency situation.
10 We're in that sphere, you know, in those --
11 all -- all those zones, we're in that sphere
12 where the executive is acting with congressional
13 authorization.

14 MR. CAMPBELL: Your Honor, I disagree
15 that this is congressional authorization because
16 it's not a modification. It goes way beyond
17 that. It creates a brand-new program, and
18 that's not what the HEROES Act allowed.

19 If the HEROES Act did allow the
20 wholesale rewriting of statutes whenever an
21 emergency arose, then that would create an
22 issue -- constitutional issue under Clinton
23 versus City of New York, and it essentially
24 would be allowing the executive branch to go in
25 and rewrite statutes after the fact, and the

1 executive branch doesn't have that power.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Just pick up on the discussion that
5 we've been having, the breadth of the statute at
6 issue here.

7 How does it compare to the breadth of
8 the statutes that were at issue in our major
9 questions doctrine, where we indicated enough
10 even though the breadth of some of those
11 provisions would by their terms literally cover
12 the authority that the agency exercised, that
13 given the nature of the authority and its
14 consequences, that was not clear enough?

15 MR. CAMPBELL: Your Honor, I think
16 it -- it fits within those cases. And I would
17 point the Court specifically to Alabama
18 Association of Realtors. In that case, the
19 statute authorized the relevant federal official
20 to engage in actions that he thought in his
21 judgment were necessary or in his judgment may
22 be necessary.

23 Yet this Court looked at that language
24 and said that it was not broad enough to -- to
25 authorize the -- the action at issue there, the

1 CDC eviction moratorium, and it did so because
2 of the major questions doctrine.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 Justice Alito?

6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: This is
8 substantially different because the Secretary is
9 authorized to cancel loans under HEA. So this
10 is not an action as a moratorium on eviction
11 which had never occurred previously or wasn't
12 within the wheelhouse of the agency. At least
13 that's what the Court said. I had -- I had a
14 difference of opinion.

15 Putting that aside, this is not an
16 action that could come as a surprise because it
17 is expressly permitted under the HEA Act, and
18 nothing in the HEROES Act says that the
19 Secretary can't do something that's in the
20 normal course of his business in circumstances
21 that justify it, like a school closing or like a
22 school engaged in fraud.

23 Those are exceptions that clearly are
24 permitted under the HEA to cancel a debt. So
25 why would I have a view that Congress didn't

1 understand that, in a proper emergency, debt
2 cancellation would be right?

3 MR. CAMPBELL: I would go back to my
4 prior -- prior answer, which is there is a
5 difference between modifying an existing loan
6 forgiveness program in light of the national
7 emergency, which is appropriate -- and an
8 example of that is to take the existing loan
9 discharge program for teachers, and there has to
10 be consecutive service, and to say if the reason
11 why that teacher would fall out of the
12 consecutive service requirement is because of
13 the national emergency, it's okay to waive that
14 requirement or to modify that requirement.

15 JUSTICE SOTOMAYOR: That's changing
16 the program. I mean, it's semantics. Clearly,
17 a waiver is an extinguishment. Whether you're
18 -- whether you're rewriting it to say a national
19 emergency will pause your service years, the
20 statute says you have to serve consecutively,
21 and the Secretary is saying you don't have to,
22 you're rewriting the statute. You just want to
23 say this is a bigger rewrite than I like. But
24 it's not rewriting the statute. It's just
25 saying this obligation is terminated.

1 MR. CAMPBELL: Your Honor --

2 JUSTICE SOTOMAYOR: This obligation to
3 serve continuously is terminated for this period
4 of time.

5 MR. CAMPBELL: It's a bigger rewrite
6 than the words "waive or modify" allow.

7 JUSTICE SOTOMAYOR: That -- that
8 really has us, as the third branch of
9 government, changing Congress's words because we
10 don't think we like what's happening.

11 MR. CAMPBELL: Your Honor, I would --

12 JUSTICE SOTOMAYOR: There's 50 million
13 students who are -- will benefit from this who
14 today will struggle. Many of them don't have
15 assets sufficient to bail them out after the
16 pandemic. They don't have friends or families
17 or others who can help them make these payments.
18 The evidence is clear that many of them will
19 have to default. Their financial situation will
20 be even worse because, once you default, the
21 hardship on you is exponentially greater. You
22 can't get credit. You're going to pay higher
23 prices for things. They are going to continue
24 to suffer from this pandemic in a way that the
25 general population doesn't.

1 And what you're saying is now we're
2 going to give judges the right to decide how
3 much aid to give them. Instead of the person
4 with the expertise and the experience, the
5 Secretary of Education, who's been dealing with
6 educational issues and the problems surrounding
7 student loans, we're going to take it upon
8 ourselves, instead of leaving that decision in
9 the hands of the person who has experience with
10 these questions.

11 MR. CAMPBELL: Your Honor, there are
12 additional statutory clues showing that Congress
13 didn't intend the creation of new loan discharge
14 programs. I'd point the Court to subsection
15 (a)(2)(D). That -- there, Congress specifically
16 identified one limited instance where the
17 Secretary could excuse the return of funds owed
18 to the government. That was grant overpayments.

19 JUSTICE SOTOMAYOR: Counsel --

20 MR. CAMPBELL: By identifying --

21 JUSTICE SOTOMAYOR: -- that was an
22 emergency, or that was a situation that was sui
23 generis. That's what emergencies are.

24 MR. CAMPBELL: Your -- Your Honor, I
25 think --

1 JUSTICE SOTOMAYOR: Sui generis
2 situations that the Secretary can address in a
3 particular situation.

4 MR. CAMPBELL: Your Honor, I think, by
5 identifying that specific example, Congress was
6 sending a message that it did not want the other
7 provisions to be used to create new loan
8 discharge programs.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 JUSTICE GORSUCH: I understood the
12 Office of Legal Counsel's memorandum to suggest
13 that the Secretary, under the statute, had
14 authority to put student borrowers in -- in the
15 same condition that they were in prior to the
16 emergency and that the nature of your argument
17 is that that -- that test is not met.

18 Do you agree with the OLC's position
19 and understanding of the statute? And -- and --
20 and do you -- and how do you -- how do you argue
21 that it's exceeded that authority?

22 MR. CAMPBELL: Your Honor, I disagree
23 with most everything in the OLC opinion, but I
24 agree with that part of the OLC opinion. I
25 think it's right that that's what the phrase "no

1 worse position" means. It means Congress was
2 telling the -- the Secretary he had the
3 authority to keep borrowers near the status quo.

4 But what we have here is a program
5 that, for 20 million borrowers, is going to
6 leave them without a single outstanding loan.
7 That goes well beyond putting them back in the
8 status quo ante.

9 And for the other approximately 20
10 million borrowers that stand to benefit from
11 this, their average debt is going to go from
12 \$29,000 to \$13,000, again, far beyond returning
13 to the status quo ante.

14 JUSTICE GORSUCH: And I understand the
15 Secretary has considerable expertise when it
16 comes to educational affairs, but with -- in
17 terms of macroeconomic policy, do we normally
18 assume that every -- every Secretary, cabinet
19 member, as learned as they are, has that kind of
20 knowledge?

21 MR. CAMPBELL: No, we don't. When
22 we're dealing with a nearly half trillion dollar
23 loan cancellation program, this is squarely in
24 the ken of Congress. Congress has the power and
25 expertise to weigh the balancing, competing

1 fiscal implications, particularly at that scale.
2 So this is something that's outside the
3 Secretary's expertise.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE KAVANAUGH: I think, when
7 we're talking about emergency powers, that
8 certainly focuses the inquiry, but that doesn't
9 mean that the executive can't take action. And
10 it all then turns on the -- I think, the
11 language of the statute at issue and the kind of
12 action taken.

13 And I think you have a good argument
14 on "modify," but what do you do with the word
15 "waive"? That is an extremely broad word. In
16 2003, Congress was very aware of potential
17 emergency actions in the wake of September 11th
18 and war, possible terrorist attacks, and yet it
19 puts that extremely broad word, "waive," into
20 the statute.

21 Why not just read that as written?

22 MR. CAMPBELL: Your Honor, I -- I
23 believe we are reading it as written. "Waive"
24 means to excuse compliance with an existing
25 obligation. And what the Secretary is

1 purporting to do here is to change existing loan
2 discharge program. The Secretary is not waiving
3 anything in those provisions. And so we think,
4 as I explained earlier, that the word "waiver"
5 simply doesn't apply here.

6 Now, to the extent the Court looks at
7 the term "waiver" and finds that that's cause to
8 read the phrase "waive or modify" a little more
9 broadly, it still doesn't reach this program,
10 because the Secretary is not dealing with any of
11 these existing provisions that he purports to
12 cite. He's not changing anything within them.
13 He's frankly ignoring what's there and creating
14 a brand-new program, and that's not within the
15 language of this statute.

16 JUSTICE KAVANAUGH: You don't think
17 that fits within "waiver"?

18 MR. CAMPBELL: I -- I don't believe it
19 does, no. A waiver is to take something away,
20 and the Secretary is not taking anything away
21 from the cited loan discharge provisions.

22 JUSTICE KAVANAUGH: And then, on the
23 body of precedent we've developed within the
24 pandemic on emergency powers and -- and major
25 executive actions, we have the eviction

1 moratorium case, we have the national OSHA
2 mandate case, but, on the other hand, we have
3 the healthcare mandate case, and I think the
4 distinction -- one of the distinctions drawn
5 there was that was more in the -- in the
6 wheelhouse of the agency in question.

7 And I think the Solicitor general has
8 argued, and I'll just get your response, on this
9 is right in the wheelhouse -- and Justice
10 Sotomayor was just saying this -- right in the
11 wheelhouse of what the Secretary of Education
12 would normally be expected to do, unlike CDC
13 doing an eviction moratorium.

14 I know you've addressed this a little
15 bit, but just to get your response on that.

16 MR. CAMPBELL: Your Honor, I don't
17 think it's in the wheelhouse because it's
18 creating a brand-new program. The only entity
19 that has created new loan discharge programs is
20 Congress. There's a number of them in the
21 Higher Education Act. But the Secretary has
22 never before created a brand-new loan
23 cancellation program, particularly under the
24 HEROES Act.

25 As I mentioned at the outset, the

1 HEROES Act has never even been used to forgive a
2 single loan in the past. That's telling because
3 one of the things the Court looks at in its
4 major questions jurisprudence is if it's
5 unprecedented. And we certainly have an
6 unprecedented use of the statute here.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Two questions, one
11 on merits, one on standing. First, on the
12 merits, do you agree that this Administration
13 and the prior administration had authorization
14 under the HEROES Act to pause loan -- loan
15 repayment obligations?

16 MR. CAMPBELL: Your Honor, it's a --
17 we're not challenging it in this case.

18 JUSTICE BARRETT: I know, but --

19 MR. CAMPBELL: I think it's a --

20 JUSTICE BARRETT: -- the question is,
21 do you think it's within it? This kind of goes
22 to the --

23 MR. CAMPBELL: Sure.

24 JUSTICE BARRETT: -- scope of "waive
25 or modify," right?

1 MR. CAMPBELL: Yes. I -- I think that
2 the -- so if I can go through the timeline to
3 explain, so the first seven days, on March 20,
4 2020, Secretary DeVos waived but didn't indicate
5 what legal authority she was using. I have no
6 way to assess that because I just don't know
7 what -- what authority she was using.

8 Then Congress came in seven days later
9 and enacted the CARES Act. The CARES Act put a
10 payment pause in place for six months. At the
11 end of that six-month period, Secretary DeVos
12 extended it for three months.

13 I think, arguably, that was a
14 legitimate use of the HEROES Act because taking
15 a congressionally created six-month program and
16 extending it for three months seems like it
17 might be a modification.

18 But now that we're two years down the
19 road, we're beyond a modification. And not only
20 that, the connection to the national emergency
21 has become even more tenuous.

22 JUSTICE BARRETT: So your argument is
23 that even assuming that Secretary DeVos
24 initially had the authority to -- and you're --
25 you're kind of just whiffing on the question

1 about before the CARES Act was passed, right?

2 But you're talking about after the
3 CARES Act was passed, she arguably had authority
4 under the HEROES Act to extend the pause but
5 that at some point as that time dragged on post
6 the CARES Act, when the new administration came
7 in, then it exceeded the authority to waive or
8 modify?

9 MR. CAMPBELL: Your Honor, it could
10 have been the -- Secretary DeVos had two
11 extensions. It could have been her second
12 extension. I don't think it hinges on who the
13 administration was.

14 At some point, I think it goes beyond
15 a modification and the connection to the
16 national emergency became too tenuous to
17 maintain it.

18 JUSTICE BARRETT: So it's not that a
19 pause is different in your mind than canceling
20 the obligation to repay the principle. It's
21 that -- or -- or I guess it's a combination of
22 the distinction between a pause and a
23 cancellation and then the temporal --

24 MR. CAMPBELL: Correct.

25 JUSTICE BARRETT: -- reach?

1 MR. CAMPBELL: Correct, because I do
2 think there are significant distinctions between
3 a pause and cancellation. I'll give you a few.

4 The first is a pause maintains the
5 status quo. Cancellation puts people in a -- in
6 a far better -- this cancellation puts people in
7 a far better position.

8 A pause keeps indebtedness from
9 rising, versus cancellation erases indebtedness.
10 In addition, as I mentioned before, the
11 connection to the national emergency, when you
12 put a pause in place, when the nation is still
13 dealing with lockdown conditions, that is a --
14 there's a pretty close connection between that
15 and a national emergency.

16 When two-and-a-half years down the
17 road the Secretary, having much time to
18 contemplate this -- this -- the situation, comes
19 in and creates a debt forgiveness program for
20 95 percent of borrowers, the connection to the
21 -- to the national emergency is too tenuous.

22 JUSTICE BARRETT: Okay. I -- I
23 understand.

24 Second question is on standing. Could
25 Missouri file suit to vindicate the interests of

1 the City of St. Louis?

2 MR. CAMPBELL: No, Your Honor,
3 because, when we look at the factors that we've
4 cited for why MOHELA is a state-created and
5 state-controlled entity, the leadership of the
6 city of Missouri is not selected by the governor
7 or by the state. They're selected at the local
8 level.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So can I just
13 understand your view on waiver or modification
14 with respect to sort of the initial applications
15 of this authority?

16 You know, we're sort of in a certain
17 species of it now, but I had understood from the
18 SG and from the briefs that originally we're
19 talking about wartime, and -- and so I'm just
20 trying to understand, are you saying that those
21 were not legitimate waivers or modifications
22 under this kind of power?

23 MR. CAMPBELL: Your Honor, we don't
24 question any of the uses of the HEROES Act prior
25 to 2020. So --

1 JUSTICE JACKSON: Right. But I -- I
2 --

3 MR. CAMPBELL: -- I don't know if I'm
4 understanding the question.

5 JUSTICE JACKSON: -- what -- what
6 is -- what is your view -- again, I'm just
7 trying to clarify your exchange with -- with
8 Justice Kavanaugh on what waiver means. So are
9 you saying that the Secretary would have had to
10 change something about the regulations but not
11 about their application with respect to the
12 obligations that they require of people?

13 MR. CAMPBELL: Your -- Your Honor, if
14 I can try to illustrate it with an example, I
15 think this might get to it.

16 There is an existing loan discharge
17 program for permanent disability that requires
18 an individual to expect to be permanently
19 disabled for at least 60 months.

20 If the Secretary came in and said,
21 because of the national emergency, if someone
22 was affected because of that, they can reduce
23 that 60-month requirement down to, say, 36
24 months, that to me is a modification of an
25 existing program. That would be an example.

1 In terms of waiver, waiver is when the
2 Secretary goes in and would take out an
3 entire -- one of the existing requirements. And
4 that's not what the Secretary is doing here.
5 That --

6 JUSTICE JACKSON: I understand.
7 But -- but -- but you're -- I guess my question
8 is, do you dispute that under the prior
9 circumstances people owed a certain amount, and
10 what the Secretary did was modified the amount
11 that they would owe as a result of this loan?

12 MR. CAMPBELL: Your Honor, I think
13 that's exactly what he was trying to do. And I
14 think that highlights why there's a problem
15 here. Let me point --

16 JUSTICE JACKSON: Okay.

17 MR. CAMPBELL: -- the Court
18 specifically to the statute that we cite on
19 pages 46 through 47 of our brief. Congress
20 knows how to authorize the Secretary to waive or
21 modify an amount owed. We cite provisions in
22 the Higher Education Act that specifically say
23 the Secretary shall waive the amount owed.

24 Here, the Secretary wasn't given that
25 language. If the Secretary instead was given

1 the power to waive or modify provisions, and so
2 that's why the analysis here have --

3 JUSTICE JACKSON: But why doesn't it
4 all -- why doesn't it all reduce to the same
5 thing? And this is where I go back to the sort
6 of original application.

7 I mean, so, fine, we have wartime
8 people who are away and you say you have no
9 problem with the Secretary modifying the
10 regulations insofar as it would help them, but
11 doesn't it reduce to just them not having to pay
12 as much? I don't understand why there's really
13 a distinction --

14 MR. CAMPBELL: Well --

15 JUSTICE JACKSON: -- between waiving
16 the -- the regulations in the way that you're
17 reading this and waiving the amount a person
18 owes under a regulation that relates to a loan.

19 MR. CAMPBELL: Your Honor, there's
20 never been a past use of the HEROES Act that
21 would eliminate the amount that someone owes.
22 So I don't think there's a prior comparator to
23 look to.

24 JUSTICE JACKSON: Okay. Let me just
25 ask you one final question on my big-picture

1 concern.

2 So I was listening carefully to your
3 opening statement, and you started by indicating
4 that this is one of today's most debated policy
5 questions, and you ended by saying that we, the
6 courts, should essentially answer it by
7 invalidating this program.

8 And what concerns me is that to the
9 extent you're talking about separation of powers
10 and major questions, the judiciary is part of
11 the same constitutional separation of powers
12 dynamic that compels us to think about questions
13 like the major questions doctrine.

14 And I feel like we really do have to
15 be concerned about jumping into the political
16 fray, unless we are prompted to do so by a
17 lawsuit that is brought by someone who has an
18 actual interest. So this is why I'm sort of
19 pressing really hard on the standing point.

20 And so do -- do you dispute that the
21 ordinary standing rule would be that a plaintiff
22 cannot establish standing by asserting the
23 interests of an independent actor or by saying
24 that an independent actor not before the Court
25 will respond to the defendant's actions in a

1 certain way?

2 I mean, isn't the ordinary rule one
3 that really doesn't cover you and what you're
4 asking for in a way is an extension of our
5 standing principles to allow for the state to
6 proceed with this action?

7 MR. CAMPBELL: Your Honor, I don't
8 believe so. I think what we're asking for is
9 the same treatment that the federal government
10 got in Cherry Cotton Mills and Erickson.

11 We're asking for the ability to assert
12 the interests of the public corporation that the
13 State of Missouri created, that it controls and
14 that it charged with performing nothing but
15 essential government functions.

16 JUSTICE JACKSON: All right. So we'll
17 go back and look at that case, and if we find
18 that the federal government had some sort of a
19 separate interest that it was asserting, do you
20 lose? I mean, is that your only case that is
21 going to make it be the case that we can find
22 standing for you?

23 MR. CAMPBELL: No, Your Honor. I
24 think that those cases are certainly helpful. I
25 would direct the Court, if the Court wants to

1 look under either federal law to see what it
2 takes to be a part of the government, I would
3 direct the Court to Lebron and Department of
4 Transportation that we cite.

5 If the Court wants to look --

6 JUSTICE JACKSON: So you reject the
7 distinction that the -- that the SG pointed to
8 with respect to what those cases were about?
9 Those were not standing cases. We have
10 different doctrines that apply when we're
11 looking at different issues.

12 And the issue of whether or not you
13 are injured by, you know, an injury to another
14 entity, an independent corporation, seems to me
15 to be a separate thing.

16 So do you have a case that would help
17 us to understand whether an entity like MOHELA
18 that has totally been isolated through state law
19 from liability, that can sue for itself, et
20 cetera, do you have a case where we've said that
21 same kind of entity you can sue as a state in --
22 because you're injured for standing purposes?

23 MR. CAMPBELL: Your Honor, I think the
24 closest cases we have are the ones I referenced
25 before, Cherry Cotton Mills and Erickson.

1 But I will say that part of the
2 inquiry has to look to state law to see if
3 Missouri is charged with speaking -- has the
4 ability to speak on behalf of MOHELA.

5 And on that front, I would point the
6 Court to two things. One is Missouri Statute
7 27.06 -- .060, which gives the attorney general
8 the right to determine whether to litigate in
9 the name of the state to protect any interest of
10 the state. And because MOHELA is a --

11 JUSTICE JACKSON: But, of course,
12 that's the question here, right?

13 MR. CAMPBELL: -- because MOHELA --

14 JUSTICE JACKSON: Yeah.

15 MR. CAMPBELL: -- is a part of the
16 state --

17 JUSTICE JACKSON: I see.

18 MR. CAMPBELL: -- and the second point
19 that I would direct the Court to is the Casualty
20 Reciprocal Exchange case. That's the case that
21 specifically identified what it means to be a
22 public corporation under Missouri state law.

23 And it identifies the same factors
24 that Lebron looked to. It's whether it was
25 created by the government, controlled by the

1 government, and whether it's performing
2 essential public purposes.

3 JUSTICE JACKSON: Thank you.

4 MR. CAMPBELL: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, General?

8 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

9 ON BEHALF OF THE PETITIONERS

10 GENERAL PRELOGAR: Thank you, Mr.
11 Chief Justice.

12 I'll pick up with standing and focus
13 on the MOHELA-related arguments.

14 Justice Barrett, you asked about the
15 provision of state law 173.420. This is a
16 provision that refers generally to Missouri
17 reserving rights over the assets of MOHELA.

18 I think, if you look at that in
19 context, it clearly functions as a savings
20 clause. It's making clear that notwithstanding
21 all of the other provisions we've pointed to,
22 like 173.425, .410, these are the provisions
23 that create the strict financial separation,
24 that Missouri is reserving its rights under
25 other sources of law, like eminent domain or

1 search and seizure, and it's not actually
2 limiting its ability to obtain assets in that
3 way.

4 I understand my friend to have
5 conceded that actually Missouri would have to
6 change its law and change the structure of
7 MOHELA if it wanted to have any direct access to
8 MOHELA's assets. And that makes sense because
9 these other provisions that I just pointed you
10 to are very clear that there is absolute
11 financial separation between the state and
12 MOHELA.

13 You asked as well about control over
14 MOHELA, which my friend has emphasized several
15 times. That's actually one of the relevant
16 questions under the arm-of-the-state doctrine,
17 whether you could direct the authority in any
18 way. I'd point to Justice Kavanaugh's decision
19 in the D.C. Circuit in the Puerto Rico Ports
20 Authority case. There, it was significant that
21 you could direct the -- the authority to sue.
22 And, here, that's obviously lacking, and the
23 state hasn't attempted to do that.

24 My friend several times brought up the
25 Cherry Cotton Mill and Erickson cases. In Cherry

1 Cotton Mill, there was an express statutory
2 right of the United States to tax offsets, and
3 the Court was interpreting that statutory
4 language and determined that the United States
5 had its own interest in the statutory right and
6 further emphasized that with respect to that
7 particular public corporation -- and I'm reading
8 from the language of the Court's opinion -- that
9 for the public corporation, "its profits, if
10 any, go to the Government; its losses the
11 Government must bear."

12 There wasn't the financial separation
13 in that case that exists here, and there was a
14 distinct statutory right on behalf of the United
15 States.

16 Erickson is even further afield. It
17 wasn't a case about standing at all. And there,
18 the United States had a contract right that the
19 instrumentality had entered into as an agent of
20 the federal government. The instrumentality was
21 itself a plaintiff in that case, and there was
22 no Article III issue in the case.

23 Finally, I'll focus on the
24 contributions to the Lewis and Clark Discovery
25 Fund. This is the secondary argument as it

1 relates to MOHELA. There are huge factual
2 deficiencies in trying to premise standing on
3 that basis. As we've explained, they haven't
4 been able to bring forward allegations that
5 would substantiate the asserted financial
6 impacts on MOHELA and certainly haven't
7 established that that will be the likely cause
8 of any default to a fund that hasn't been paid
9 for the last 15 years.

10 But there's also a more fundamental
11 legal problem with their theory. It has no
12 logical stopping point. There's nothing, for
13 example, that would prevent anyone who's owed a
14 debt to say that suddenly they can have standing
15 to challenge a regulation that doesn't affect
16 them in any way because it might affect the
17 debtor, who then will be unable to make good on
18 that -- on that liability. And there is no
19 precedent in this Court's Article III doctrine
20 to support that kind of broad expansion of
21 Article III standing here.

22 Turning to the merits, I want to pick
23 up on the colloquies that my friend was having
24 about the meaning of the term "waive or modify."
25 And if I understand the gloss that he's putting

1 on that language, I don't think that there would
2 be any room to grant any kind of HEROES Act
3 relief whatsoever.

4 He says that there was no waiver or
5 modification here, but there was. The Secretary
6 took the provisions that deal with discharge and
7 cancellation and he waived the existing
8 eligibility requirements and modified those
9 provisions to add an additional basis for
10 relief.

11 This is how Secretaries across
12 administrations have implemented the HEROES Act.
13 For example, with deferment, the Secretary, in
14 prior uses of the HEROES Act, took the
15 provisions that exist for deferment and waived
16 the existing eligibility requirements and then
17 granted additional deferment in line with the
18 national emergency.

19 That fits with the plain language of
20 the statute, and to suggest that that
21 automatically creates a brand-new program would
22 leave very little room for the HEROES Act to
23 operate at all.

24 My friend is getting it exactly
25 backwards. The fact that there are already

1 statutory provisions for things like deferment
2 and forbearance and discharge demonstrates that
3 Congress could foresee that all of those are
4 ways that you grant financial relief to
5 student-loan borrowers.

6 And in the context of a statute like
7 this one that is centrally focused on ensuring
8 that the Secretary can act in unforeseen
9 circumstances outside the existing scope of
10 those provisions, Congress directed that the
11 Secretary has the authority to waive or modify
12 in order to expand eligibility for those forms
13 of relief.

14 So we'd ask the Court to reject the
15 states' arguments here.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 12:15 p.m., the case
19 was submitted.)

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Official - Subject to Final Review

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